

[Cite as *Ohio Bell Tel. Co. v. Kassouf Co.*, 2015-Ohio-3030.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101970

OHIO BELL TELEPHONE COMPANY

PLAINTIFF-APPELLANT

vs.

KASSOUF COMPANY, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-13-806900

BEFORE: Laster Mays, J., E.A. Gallagher, P.J., and Stewart, J.

RELEASED AND JOURNALIZED: July 30, 2015

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ANITA LASTER MAYS, J.:

{¶1} In this negligence action, plaintiff-appellant Ohio Bell Telephone Company, d.b.a. AT&T Ohio (referred to at trial as “AT&T”), appeals the trial court’s denial of its motion for judgment notwithstanding the verdict (“JNOV”) in this case in which the jury rendered a verdict on AT&T’s claim in favor of defendant-appellee Leon Riley, Inc. (“Riley”).

{¶2} AT&T presents two assignments of error. AT&T asserts that the trial court improperly denied its motion on two bases: (1) the jury’s verdict was against the manifest weight of the evidence because R.C. 153.64(D) imposed a duty on Riley as a matter of law and the evidence proved Riley breached its duty; and (2) the trial court’s instructions to the jury should not have included one on comparative negligence.

{¶3} A review of the record, however, does not support AT&T’s assertions. Consequently, AT&T’s assignments of error are overruled, and the trial court’s order is affirmed.

Facts and Procedural History

{¶4} This action results from a storm sewer construction project undertaken by the Northeast Ohio Regional Sewer District (“NEORS”) that began in 2002. NEORS obtained design plans for the project from an engineering company, then hired the Kassouf Company (“Kassouf”) as its general contractor for the project. NEORS

provided the design plans to Kassouf. The plans identified the locations and approximate depths of the existing underground utilities.

{¶5} The project required the installation of a tunnel under Broadway Avenue just south of Interstate 480 in Maple Heights, Ohio. Kassouf hired Riley as its subcontractor to perform one part of the project. After Kassouf prepared a “bore pit” for Riley “to work out of,” Riley was to use a machine with an auger to bore horizontally under Broadway Avenue, connect with an existing sewer’s “manhole,” place a “four foot diameter steel casing” into the bore, and then install a sewer pipe inside the casing.¹

{¶6} The bore pit that Kassouf dug “was probably as long as [the courtroom] and it was 25, 30 feet deep” because “it was not just for the bore, there was going to be a big concrete structure built in there later.” According to Kassouf’s project superintendent, Ralph Dodero (“Dodero”), the plans “showed the AT&T ducts way up” above the bore pit and “perpendicular” to the placement of the bore. Dodero stated that “on the prints, [AT&T’s utility duct] was 15 feet higher than we were going to be.”

{¶7} On March 13, 2007, Riley’s operator arrived at the site to perform the bore “at one end of the pit.” Before the operator began, Dodero took him out onto the street “with the plans” and indicated the placement of the “tie in” sewer line. Dodero testified that the plans showed “all the other utilities, water line, gas line, AT&T line” were “way above” the proposed bore, and that the Ohio Utilities Protection Service (“OUPS”) had already sent out “people to mark” on the pavement the courses of the existing utility lines.

¹ Quotes are taken from trial testimony.

Thus, because performing a “test drill” could rupture a telephone or gas line, the bore pit was “so deep,” and “the drawings” showed the lines as being approximately “15 feet above” where the bore was to occur, Kassouf “didn’t do any [field] testing.”

{¶8} As the Riley operator performed the bore, the auger struck something that later proved to be AT&T’s telephone conduit. AT&T expended \$338,596.13 to repair the damage. Subsequently, AT&T brought the instant negligence action against Kassouf and Riley.

{¶9} The record reflects AT&T eventually settled its claim against Kassouf. AT&T’s claim against Riley proceeded to a jury trial. After considering the evidence, the jury rendered a verdict in Riley’s favor on AT&T’s claim. According to the interrogatory answer the jury supplied, the jury found that Riley was not negligent in dealing with AT&T’s underground lines. After finding that Riley was not negligent, the jury did not address the interrogatory on comparative negligence. The trial court entered judgment on the jury’s verdict, and later denied AT&T’s motions for JNOV and/or a new trial.

Law and Argument

{¶10} AT&T appeals from the trial court’s order and presents two assignments of error, as follows:

I. The trial court erred in not granting AT&T’s Motion for JNOV in that the jury’s verdict and the court’s judgment were against the manifest weight of the evidence which unquestionably established that Riley had actual notice of the AT&T conduit and cables within its construction area that it destroyed — as to which, under the governing statute (R.C. 153.64(D)),

together with the cases interpreting it, Riley was negligent as a matter of law and, therefore, liable to AT&T.

II. The trial court erred in overruling AT&T's objections to, and in later denying AT&T's Motion for JNOV addressing the trial court's giving jury instructions and interrogatories regarding AT&T's alleged comparative negligence where, again as here, the uncontroverted evidence at trial established that Riley had actual notice of the AT&T conduit and cables within its construction area—as to which, again under the governing statute (R.C. 153.64(D)), together with the cases interpreting it, AT&T's alleged comparative negligence was, as a matter of law, inapplicable.

{¶11} AT&T argues that, because the evidence presented at trial demonstrated that Riley did not determine the actual depth of the telephone conduit before it commenced its horizontal bore, pursuant to R.C. 153.64(D), Riley was negligent as a matter of law. On this basis, AT&T asserts in its first assignment of error that the trial court acted improperly in denying AT&T's motion for JNOV. This court disagrees.

{¶12} This court applies a de novo standard of review to a trial court's order that denies a motion for JNOV. *Zappola v. Rock Capital Sound Corp.*, 8th Dist. Cuyahoga No. 100055, 2014-Ohio-2261, ¶ 63. In considering the motion, the court should construe the evidence in the light most favorable to the nonmoving party. *Id.* at ¶ 64, citing *Posin v. A.B.C. Motor Court Hotel, Inc.*, 45 Ohio St.2d 271, 275, 344 N.E.2d 334 (1976). If there is substantial evidence to support the nonmoving party's side of the case and if reasonable minds could reach different conclusions, the motion should be denied. *Id.* The court will not weigh the evidence and the credibility of the witnesses in deciding the motion. *Id.*

{¶13} AT&T claimed that Riley was negligent. In order to establish actionable negligence, one must show the existence of a duty, a breach of that duty and injury resulting proximately therefrom. *Mussivand v. David*, 45 Ohio St.3d 314, 318, 544 N.E.2d 265 (1989).

{¶14} Courts have held that, “[in] Ohio, a nondelegable duty is imposed upon an excavator to inform himself as to whether utility lines exist below ground so that he may avoid damaging them.” *Northeast Ohio Natural Gas Corp. v. Stout Excavating, Inc.*, 156 Ohio App.3d 144, 2004-Ohio-600, 804 N.E.2d 1040, ¶ 7 (9th Dist.), citing *GTE N., Inc. v. Carr*, 84 Ohio App.3d 776, 779, 618 N.E.2d 249 (4th Dist.1993), *see also Boyd v. Moore*, 184 Ohio App.3d 16, 2009-Ohio-5039, 919 N.E.2d 283 (2d Dist.). An excavator who fails to act under this common law duty proceeds at his own risk and will be liable for any damage he may cause to underground utility lines. *Id.* However, because this case involved a public improvement project, AT&T premised its negligence claim against Riley on R.C. 153.64. That statute applies to public improvement projects such as the sewer district’s, and provides in relevant part as follows:

(B)(1) In any public improvement which may involve underground utility facilities, *the public authority*, prior to preparing plans and specifications, *shall contact a protection service and any owners of underground utility facilities* that are not members of a protection service *for the existence and location of all underground utility facilities* within the construction area.

(2) If requested by the public authority, *each owner of underground utility facilities within the construction area*, * * * *shall do one of the following* within ten days of receiving notice from the public authority or a protection service:

(a) *Mark the location of the underground utility facilities, * * * within the construction area* in accordance with the marking standards described in division (C) of section 3781.29 of the Revised Code;

(b) *Provide digital or paper drawings, or both, that meet both of the following requirements:*

(I) They are *drawn to scale* and include locatable items. Locatable items may include poles, pedestals, back of curb, sidewalk, edge of pavement, centerline of ditch, property lines, and other similar items.

(ii) They *depict the location* of the underground utility facilities.

Compliance with division (B)(2) of this section does not relieve an owner of underground utility facilities from compliance with the marking requirements of section 3781.29 of the Revised Code.

(3) The public authority shall include, *in the plans and specifications* for such improvement, *the identity and location of the existing underground utility facilities* located in the construction area *as provided to the public authority by the owner of the underground utility facility* * * *.

* * *

(C) The contractor to whom a contract for a public improvement is awarded or its subcontractor, at least two working days, excluding Saturdays, Sundays, and legal holidays, but no more than ten working days, *prior to commencing construction operations in the construction area* which may involve underground utility facilities, shall cause notice to be given to a protection service * * *. *The owner of the underground utility facility, within forty-eight hours, excluding Saturdays, Sundays, and legal holidays, after notice is received, shall stake, mark, or otherwise designate the location of the underground utility facilities in the construction area in such a manner as to indicate their course together with the approximate depth at which they were installed.*

(D) Any public authority who complies with the requirements of division (B) of this section and any contractor or its subcontractor who complies with the requirements of division (C) of this section shall *not* be responsible to the owner of the underground utility facility *if underground utility lines are encountered not as marked in accordance with the provisions of division (C) of this section by the owner of the underground utility facility,*

unless the contractor or its subcontractor has actual notice of the underground utility facility. Except as noted in this division, this section does not affect rights between the contractor or its subcontractor and the owner of the underground utility facility for failure to mark or erroneously marking utility lines. The public authority shall not make as a requirement of any contract for public improvement any change in responsibilities between the public authority and the owners of the underground utility facilities in connection with damage, injury, or loss to any property in connection with underground utility facilities.

(Emphasis added.)

{¶15} No one disputed in this case that the contractor, and, by extension, Riley, complied with R.C. 153.64(C). Rather, the dispute concerned whether, because the contractor, and, by extension, Riley, knew that a telephone line was buried underground in the *area* where the horizontal bore was to be performed, R.C. 153.64(D) imposed a duty on them to conduct tests to determine the depth of AT&T's lines.

{¶16} AT&T asserted that because the drawings were supplied to the contractor and Riley indicated that the telephone conduit *existed* in the construction area, Riley had "actual notice of the underground utility facility." AT&T claimed that Riley's failure to perform "field tests" to determine the actual depth of the telephone conduit prior to conducting the horizontal bore constituted a violation of its duties under R.C. 153.64(D); therefore, Riley was liable to AT&T for the damage that resulted. Contrary to AT&T's assertion, however, the evidence presented at trial did not prove that Riley failed in the duties placed upon it by R.C. 153.64.

{¶17} R.C. 153.64(D) does not define the phrase "actual notice." But in *Southeastern Natural Gas Co. v. Vititoe Constr., Inc.*, 5th Dist. Delaware

No. 10CAE070053, 2011-Ohio-1844, in defining that phrase, the court focused on testimony that proved the contractor was aware of the precise location of an underground facility as depicted, in part, by “accurate” construction drawings. The evidence presented in this case, however, proved that the construction drawings supplied to the contractor by the NEORSD were inaccurate. On the official plans prepared by AT&T, it displayed the AT&T duct bank at least nine to ten feet above where Riley started to drill. This information was incorrect, and the record showed that AT&T did not know the actual depth of the duct bank. During the trial, AT&T’s expert witness, licensed mechanical engineer Dennis A. Guenther (“Dr. Guenther”), testified that “even with a Ph.D. in mechanical engineering, he could not tell from looking at AT&T’s drawing where the duct was located.” He further stated that no one else would be able to locate it from the incorrectly drawn map either. Consequently, the use of the *Vititoe* decision to support AT&T’s assertion that the trial court’s denial of its Civ.R. 50(B) motion was in error is of little use. *Vititoe* had “accurate” drawings, AT&T’s drawings were “inaccurate.”

{¶18} Similarly, AT&T’s use of *E. Ohio Gas Corp. v. Perram Elec., Inc.*, 9th Dist. Summit No. 25060, 2010-Ohio-2993, is inapt to the facts presented in this case. In *Perram*, the utility company marked the existence of the gas lines and the contractor did not start excavation work until four days later. In the interim, a different contractor had installed a curb within a few feet where the contractor was to do work. The markings

had been disturbed, the contractor began work and ruptured a gas line. The court found in favor of the utility company reasoning that:

[t]he record reveal[ed] that Dominion *provided Perram* with *reasonably accurate* information as to the approximate location of Dominion's gas line pursuant to its obligations under R.C. 153.64. Perram, however, breached the common law duty it owed to Dominion to adequately inform itself of the *existence* of any underground utility lines before excavating.

(Emphasis added.) *Id.* at ¶ 16. *See also United Tel. Co. v. C.J. Mahan Constr. Co.*, 63 Ohio App.3d 437, 579 N.E.2d 250 (10th Dist.1989) (subcontractor that began excavating without notifying utility, actually encountered utility's line, assumed line was inoperative and proceeded with excavation, severing the line, was liable to utility for damage pursuant to R.C. 153.64).

{¶19} A situation that bears more relevance to the facts in this case was presented to the court in *United Tel. Co. v. Williams Excavating, Inc.*, 125 Ohio App.3d 135, 707 N.E.2d 1188 (3d Dist.1997). In that case, the appellate court reversed the trial court's decision that the telephone company was entitled to judgment against the contractor as a matter of law pursuant to R.C. 153.64, because "[t]here was substantial, competent evidence produced upon which evidence reasonable minds might reach different conclusions" concerning whether the sewer district complied with its duty under R.C. 153.64 to provide accurate information about the location of the telephone lines to its contractor.

{¶20} The sewer district in *Williams Excavating* planned to install sewer lines for a subdivision and had obtained inaccurate information about the location of the

underground telephone lines from the telephone company. Although the sewer district's engineer personally observed that the area had telephone lines where the telephone company had not indicated them, in drawing up the construction plans, he never verified the information he received from the telephone company. Contractor Williams Excavating relied upon those plans, but struck a telephone line. The appellate court determined that the sewer district's liability under R.C. 153.64 could not be resolved "as a matter of law," but, rather, was an issue for the jury. Notably, the *Williams Excavating* court did not imply that the contractor had a duty under R.C. 153.64 to verify the location of the telephone lines prior to excavating the area.

{¶21} The evidence in this case was to the same effect. Although AT&T's expert witness, Dr. Guenther, opined that Riley should have conducted "field tests" to ensure that the telephone lines were not in the area of the horizontal bore, Guenther admitted that he had never prepared construction drawings for a public improvement project, and that he was not familiar with the practices of the industry with respect to a sewer construction project. Riley's witnesses, on the other hand, had extensive experience in the construction industry for public improvements. They testified that they did not perform "field tests" to determine the depths of utilities when excavating; rather, they relied on the plans supplied by the "public authority," i.e., the NEORSD. Tavis Riley testified it was not a common practice in the industry to "field verify" before commencing a horizontal bore.

{¶22} According to Riley, excavators worked outside of a “tolerance zone” of a utility’s placement on the project’s plans in case the plans were slightly inaccurate. Riley stated that at the time of the incident, his operator was well outside this tolerance zone. Compare *Ohio Gas Co. v. Blaze Bldg. Corp.*, 6th Dist. Williams No. WM-03-019, 2004-Ohio-2881, ¶ 26 (although excavator knew of existence of a six-inch gas pipe, he operated his auger inside of the tolerance zone). Dodero went further; he testified that “field tests” such as those Guenther proposed were not performed by an excavator because utility ducts and conduits can be “fragile, and the guy running a drill [into the ground] * * * would [n]ever know when he cut into one. He could go right through it and sever the cable that way.” Thus, “field testing” into a gas line, for example, could be catastrophic.

{¶23} An analysis of the issue AT&T raises in its first assignment of error was offered in *E. Ohio Gas Co. v. Kenmore Constr. Co.*, 9th Dist. Summit Nos. 19567 and 19790, 2001 Ohio App. LEXIS 1444 (Mar. 28, 2001). In response to the East Ohio Gas Company’s claim that, pursuant to R.C. 153.64, it had “no duty to provide an excavator with the depth of the line,” rather, the excavator had an “obligation * * * to discover the actual location of the line,” the *Kenmore* court noted that the statutory scheme:

contemplates that the utility owner, as the party that installed the underground facility, will be *primarily* responsible for providing *reasonably accurate information* as to the approximate location of the line, at least at the time it was installed. R.C. 153.64(C) and 3781.29(A)(1). That information must be sufficient to enable the excavator to proceed cautiously in pinpointing the actual location, so that the line will not be damaged.

That the primary responsibility lies with the utility owner is supported by a provision in the public improvement act. R.C. 153.64(D) actually *relieves* an excavator in a public improvement project of liability, where *proper* notice is provided [by the contractor] to the utility owner, pursuant to the statutory requirements * * *.

(Emphasis added.)

{¶24} This court finds the foregoing analysis instructive in this case. Because R.C. 153.64 does not define the phrase “actual notice,” this court construes the phrase in favor of Riley as the nonmoving party in the context of ruling upon a Civ.R. 50(B) motion. Based upon the evidence presented in this case, Riley could not be deemed “negligent per se”; thus, the trial court properly denied AT&T’s motion for JNOV. AT&T’s first assignment of error is overruled.

{¶25} The argument AT&T presents in its second assignment of error is closely related to the argument presented in its first. AT&T contends that the duty imposed on a contractor by R.C. 153.64(D) rendered a jury instruction on comparative negligence improper. Citing *GTE N., Inc.*, 84 Ohio App.3d at 779, 618 N.E.2d 249, AT&T asserts that the trial court erred when it provided such an instruction over AT&T’s objection. However, based upon our disposition of AT&T’s first assignment of error, and in conjunction with the jury’s answer to Interrogatory No. 1, we need not address AT&T’s argument.

{¶26} This court has already determined that the phrase “actual notice” as used in R.C. 153.64(D) must be read in favor of the nonmoving party in the context of a Civ.R. 50(B) motion. Thus, on the facts of this case, Riley could not be deemed “negligent per se” under that statute. *GTE N., Inc.*, moreover, did not involve a public improvement project. Therefore, it is of little use in deciding AT&T’s assertion.

{¶27} Instead, the observation made by the court in *Sloan v. Vingle*, 11th Dist. Trumbull No. 2012-T-0068, 2013-Ohio-4754, ¶ 21, applies to the facts presented in this case:

[A]ny potential error regarding the issue of comparative negligence is moot since the jury did not find [defendant] negligent. Jury Interrogatories Nos. 3, 4, and 5 addressed the question of whether [plaintiff] was negligent and, if so, whether her negligence was a proximate cause of the accident and, if so, what percentage of the accident was attributable to [plaintiff’s] negligence. The jury answered none of these interrogatories, since it was properly instructed not to answer them if it did not find [defendant] negligent. *Jarrell v. Woodland Mfg. Co.*, 7 Ohio App.3d 320, 455 N.E.2d 1015 (10th Dist.1982), paragraph two of the syllabus (“[w]here the question of plaintiff’s negligence does not arise unless defendant is negligent, the jury should be requested to answer the interrogatories submitted to it with respect to defendant’s negligence prior to answering interrogatories with respect to plaintiff’s negligence”). Since the jury never made any

determination regarding [plaintiff's] comparative negligence, any assignments of error regarding this issue are moot.

{¶28} Based upon the foregoing, AT&T's second assignment of error is moot.

{¶29} The trial court's order is affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANITA LASTER MAYS, JUDGE

EILEEN A. GALLAGHER, P.J., and
MELODY J. STEWART, J., CONCUR