

The Supreme Court of Ohio

CASE ANNOUNCEMENTS

June 8, 2021

[Cite as *06/08/2021 Case Announcements #3, 2021-Ohio-1925.*]

APPEALS NOT ACCEPTED FOR REVIEW

2021-0194. Clark v. Ohio Dept. of Transp.

Franklin App. No. 19AP-495, 2020-Ohio-5400.

Stewart, J., dissents.

Brunner, J., dissents, with an opinion.

BRUNNER, J., dissenting.

{¶ 1} The sole proposition of law this court has been requested to review in this appeal is whether, pursuant to *Sopkovich v. Ohio Edison Co.*, 81 Ohio St.3d 628, 693 N.E.2d 233 (1998), an entity hiring an independent contractor to perform inherently dangerous work may be held liable for harm to an employee of the independent contractor when the hiring entity retains or exercises control over a critical workplace variable affecting how the independent contractor exercises its discretion when undertaking project activity that is inherently dangerous. In this case, defendant-appellee, Ohio Department of Transportation (“ODOT”), hired Kokosing Construction Company, Inc., to perform demolition work on the Hopple Street overpass above Interstate 75 in Cincinnati. A Kokosing construction worker, Brandon Carl, was killed when part of the overpass collapsed during the removal process. Michael Clark, the administrator of Carl’s estate, the plaintiff-appellant here, now seeks to hold ODOT liable for his death.

{¶ 2} Appellant alleges that under the terms of the contract between ODOT and Kokosing, ODOT retained sole control over the closure of lanes on I-75 under the overpass. The contract provided that the “[l]ength and duration of lane closures and restrictions shall be at the approval of the [ODOT] Engineer.” ODOT also required that I-75 traffic below the overpass being removed

not be impeded aside from ODOT's Maintenance of Traffic plan, nor stopped during the demolition process. To achieve this objective, ODOT permitted certain lanes to be closed only for certain limited periods of time. It also prohibited the use of certain equipment over active traffic and imposed stiff fines, which would accrue in 15-minute increments, for unauthorized traffic stoppages on I-75. Appellant seeks to have this court review the issue whether these contract provisions constitute the exercise of control by ODOT over a critical variable that affected the demolition process. A majority of this court has declined to consider the question.

{¶ 3} According to the summary-judgment decision of the Court of Claims, which was affirmed by the Tenth District Court of Appeals, appellant offered evidence from an expert witness that the structure of the overpass could have been removed more safely if the center span, rather than the eastern span, would have been removed first. But this would have required removal of the center span from below. However, appellant's expert engineering testimony to that effect was disregarded by both the Court of Claims and the Tenth District as conclusory or not based on facts in the record, and therefore, both courts found that no genuine issue of material fact remained to impede summary judgment.

{¶ 4} Appellant argued that because the method determined, created, and used by Kokosing's engineers and construction crew to carry out the demolition under these conditions was necessitated by ODOT's contract requirements, ODOT was responsible for Carl's death. Because appellant's expert did not analyze how Kokosing undertook the methods it developed to keep lanes open beneath the demolition, his testimony was disregarded by the Court of Claims and the Tenth District. However, appellant's expert's opinion was that there was a safer way to remove the bridge, even though that method would have run afoul of ODOT's requirement that traffic lanes be kept open beneath the demolition.

{¶ 5} Kokosing's demolition method involved the use of excavating machinery fitted with a mechanical arm to grab and remove parts of the bridge while the equipment was on top of the overpass. The work on the eastern portion was performed while traffic was moving southbound on I-75 beneath the overpass. The method proved to be ineffective, causing the eastern span of the overpass structure to "teeter-totter" with the excavator machinery and its operator on the overpass. Eventually, the eastern side of the center span fell, causing the entire center span to collapse and fall onto the southbound lanes of I-75 below. The falling debris and excavator (with

the operator still in it) crushed and killed Carl, Kokosing's employee who was stationed nearby for the purpose of signaling with a flashlight to the team working above.

{¶ 6} At the portion of the overpass that collapsed with the excavator on it, there were two vertical concrete supporting beams. Appellant's engineering expert testified by affidavit that the safer method to avoid the teeter-totter effect entailed removing first the center section between these two beams, but this would have entailed removal from below the overpass, which was precluded by ODOT's contract with Kokosing. A tractor-trailer driver in traffic below the overpass crashed his truck into the fallen concrete on I-75 and was injured.

{¶ 7} The issue before the court is whether contract requirements for inherently dangerous work that prohibit or create a disincentive for the maintenance of a safe work environment for an independent contractor's workers and the public constitute the exercise of control over a critical variable in the workplace under *Sopkovich*, 81 Ohio St.3d 628, 693 N.E.2d 233. After the accident, southbound lanes on I-75 had to be closed and Kokosing paid more than \$1 million in contractually agreed penalties for those closures due to the length of time the lanes were closed as a result of the collapse.

{¶ 8} There was evidence before both courts that during the bidding process, ODOT had been questioned about its punitive sanctions for unauthorized lane closures. Appellant alleges that one bidder pointed out the safety risks, that it asked ODOT for the right to bypass the contract's lane-closure rules and close I-75 traffic, and that ODOT refused the bidder's request.

{¶ 9} Our most recent major case on the issue of project-manager control over an independent contractor's work was decided more than 23 years ago in *Sopkovich*. *Sopkovich* stands for the principle that a project manager or property owner may be held liable for injuries to or the death of an employee of an independent contractor if the project manager or property owner “ “actively participated” [i.e.,] *directed the activity* which resulted in the injury and/or gave or denied permission for the critical acts that led to the employee's injury, rather than merely exercising a general supervisory role over the project.” (Emphasis added in *Sopkovich*.) *Id.* at 641, quoting *Bond v. Howard Corp.*, 72 Ohio St.3d 332, 337, 650 N.E.2d 416 (1995), quoting *Cafferkey v. Turner Constr. Co.*, 21 Ohio St.3d 110, 488 N.E.2d 189 (1986), syllabus. The case also stands for the proposition that “active participation giving rise to a duty of care may be found to exist” where a project manager or property owner either directs or exercises control over the

work activities of the independent contractor’s employees, or where the manager or owner “retains or exercises control over a critical variable in the workplace.” *Id.* at 643.

{¶ 10} Here, appellant presented evidence that the decision whether to keep lanes below the overpass open was critical to the safe performance of the overpass demolition. As a result, a reasonable jury could have concluded that the method by which the Hopple Street overpass was to be removed was controlled by ODOT, both by requiring that lanes below stayed open and by denying closure and imposing heavy fines if they were closed.

{¶ 11} The appellate court found as a matter of law that ODOT’s contract requirements and control did not meet the *Sopkovich* standard regarding active participation and exercising control over a critical variable of the workplace related to Carl’s cause of death. No one denied that the demolition work was inherently dangerous. In short, both the Court of Claims and the Tenth District viewed Kokosing’s engineering analysis as preclusive of a competing engineering analysis that favored closing I-75 below the overpass for safety reasons.

{¶ 12} This appeal should have been accepted to review and clarify the meaning of two concepts—(1) “active participation” and (2) retaining or exercising control over a “critical variable” in the workplace—when a contract builds in terms that could be construed to be inherent control over workplace- and public-safety issues for an entity that hired an independent contractor. In particular, although ODOT claims that this is merely a “routine summary-judgment case [that] does not merit further review,” I am concerned that to the extent the Court of Claims may have inappropriately decided contested factual matters on summary judgment, the Tenth District’s affirmance, approving of that action, may be viewed as establishing an incorrect rule of law concerning how “active participation” may be established. And that, in turn, will inappropriately prevent victims of workplace injuries from holding culpable the parties whose actions made it more likely they would be injured.

{¶ 13} Our consideration of whether to accept this appeal should not be affected by the fact that the state of Ohio is involved. Numerous appellate districts have relied on *Sopkovich* in a variety of nongovernmental settings, both to find liability and to find the absence of liability. *See, e.g., Strayer v. Cox*, 2015-Ohio-2781, 38 N.E.3d 1162, ¶ 2, 55, 58 (2d Dist.) (holding that property owner did not actively participate in work of contractor); *Pinkerton v. J & H Reinforcing and Structural Erectors*, 4th Dist. Scioto Nos. 10CA3386 and 10CA3388, 2012-Ohio-1606, ¶ 36 (affirming conclusion on summary judgment that independent contractor did not actively

participate in work of another independent contractor); *McClary v. M/I Schottenstein Homes, Inc.*, 10th Dist. Franklin No. 03AP-777, 2004-Ohio-7047, ¶ 70, 83-84 (same); *Nibert v. Columbus/Worthington Heating & Air Conditioning*, 12th Dist. Fayette No. CA2009-08-015, 2010-Ohio-1288, ¶ 27 (holding that genuine issue of material fact existed as to whether subcontractor actively participated in work of another subcontractor); *Green v. Krill Co.*, 8th Dist. Cuyahoga Nos. 80636 and 80665, 2002-Ohio-4427, ¶ 25-27 (holding that sufficient evidence existed to enable jury to conclude that subcontractor actively participated in the work of another subcontractor). And determining what is “active participation” and what is a “critical variable” are generally questions of fact that are often submitted to juries. *See, e.g., Nibert* at ¶ 25, 27 (reversing grant of summary judgment because issue of active participation “should be left to a jury to decide”); *Green* at ¶ 25-27 (affirming jury verdict in part because sufficient evidence existed to support finding of active participation). Because the Court of Claims, by statute, has no jurisdiction to conduct jury trials, *see* R.C. 2743.03(C)(1), our refusal to consider this issue will leave future litigants in more vulnerable positions—whether they are project managers, independent contractors, or employees of independent contractors—because the precedent is established by a magistrate or single judge of the Court of Claims, with no testing of the evidence after consideration by members of a community in the form of a jury. Thus, there is the danger that a decision of the Court of Claims may influence as a matter of law the factual analyses of future trial and appellate courts.

{¶ 14} With the Tenth District’s decision left unreviewed, other courts, in crafting jury instructions or even in applying the Ohio Rules of Evidence to objections at a trial, may be tempted to use the factual findings made on summary judgment as a legal basis to admit or preclude evidence, the substance needed for identifying truth at a trial. I would also note that, in *Sopkovich*, 81 Ohio St.3d 628, 693 N.E.2d 233, the entity at issue was a public utility with obligations to the public similar in many ways to those of ODOT.

{¶ 15} It was important that this court review the court of appeals’ decision because this case did not make it past summary judgment proceedings. Both the Court of Claims and the court of appeals decided disputed facts without the benefit of a contested trial before a fact finder. Accepting this appeal could have accomplished more than mere error correction. It could have prevented obfuscation of factual and legal analyses in the crafting and reviewing of Ohio jury instructions and in rendering sound evidentiary rulings in determining what evidence may be

considered by a fact finder in order to reach the truth in liability cases. Our review would have been instructive to trial and appellate courts and thereby benefited workers, independent contractors, project managers, and the public. For these reasons, I respectfully dissent.
