[Cite as *N. Coast Premier Soccer, L.L.C. v. Ohio Dept. of Transp.*, 2013-Ohio-1677.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

North Coast Premier Soccer, LLC,	:	
Plaintiff-Appellee/ Cross-Appellant,	:	
v.	:	No. 12AP-589 (Ct. of Cl. No. 2009-07091)
Ohio Department of Transportation et al.,	:	(REGULAR CALENDAR)
Defendants-Appellants/ Cross-Appellees.	:	
	:	

D E C I S I O N

Rendered on April 25, 2013

Mansour, Gavin, Gerlack & Manos Co. L.P.A., Anthony J. Coyne and *Brendon P. Friesen*, for appellee/cross-appellant.

Michael DeWine, Attorney General, *Randall W. Knutti* and *Jeffrey L. Maloon*, for appellants/cross-appellees.

APPEAL from the Court of Claims of Ohio

TYACK, J.

{¶ 1} Defendants-appellants, Ohio Department of Transportation ("ODOT"), appeals the decision of the Court of Claims of Ohio finding negligence and awarding plaintiff-appellee, North Coast Premier Soccer, LLC ("NCPS") damages. NCPS cross-appeals and alleges the Court of Claims abused its discretion in permitting an amendment to ODOT's answer in finding negligence in construction and in determining damages.

{¶ 2} ODOT presents the following assignments of error:

> 1. The trial court's damages awards are both speculative and unrelated to the flood.

2. The trial court erred by denying ODOT's motion for summary judgment.

{¶ 3} NCPS presents the following cross-assignments of error:

I. The trial court erred in finding that ODOT did not negligently construct and design Ramp E-S.

II. The trial court erred in failing to award NCP Soccer all of the damages it incurred as a result of ODOT's negligence.

III. The trial court abused its discretion in permitting ODOT to amend its answer just days before trial to assert three meritless affirmative defenses, release, waiver and *res judicata* and refusing to strike the same and issue sanctions against ODOT.

I. Factual and Procedural Case History

{¶ 4} This case arises out of a flooding incident that occurred on the adjoining properties of ODOT and NCPS in August 2007. NCPS owns and maintains a large soccer complex both north and west of the interchange of U.S. Route 224, Interstate 71, and Interstate 76 in Seville, Ohio.

{¶ 5} ODOT made improvements to the interchange and was required to obtain a permit from the Ohio Environmental Protection Agency in order to do so. This permit allowed a contractor to discharge sediment-laden storm water onto the surrounding property. This permit required any contractor to employ a storm water pollution prevention plan with appropriate temporary sediment erosion controls utilizing best management practices. One of the planned improvements to the interchange was the building of a 30-foot earthen ramp ("Ramp E-S") that was immediately south and east of NCPS's property and north of I-76 and U.S. 224.

{¶ 6} On August 20, 2007, heavy rains forced a shutdown of the construction site. Storm water subsequently began accumulating on the south side of Ramp E-S, eventually backing up storm water onto I-76 forcing the closure of several lanes of traffic. This was likely a result of the temporary culverts under Ramp E-S failing to function properly. ODOT's project engineer directed the water to be pumped off I-76 and into a ditch along I-76 adjacent to NCPS's property. This pumping continued until either August 23 or 24.

This pumping flooded some of NCPS's fields with sediment-laded water for which suit was brought claiming ODOT was liable for the damages.

{¶ 7} A trial before a magistrate of the Court of Claims and a judge of that court adopted the magistrate's decision, finding ODOT's negligence caused at least 27,228,000 gallons of sediment-laden water to be discharged onto NCPS's fields, resulting in sediment being deposited on the fields. The court found that ODOT owed a duty to NCPS to comply with ODOT's EPA permit and that ODOT breeched that duty by failing to reasonably employ the best management practices in dealing with the storm water which resulted in damage to NCPS's fields. The Court of Claims found damages in the amount of $102,725.50 for repair costs, lost net profits, and the $25 filing fee. The Court of Claims filed its entry on June 6, 2012. ODOT timely appealed and NCPS timely cross-appealed.

{¶ 8} Prior to the flooding, ODOT commenced an eminent domain proceeding against NCPS in the Medina County Court of Common Pleas to acquire the property needed for the interchange improvement. *Gordon Proctor, Dir. of Ohio Dept. of Transp. v. N. Coast Premier Soccer, Ltd.*, Medina C.P. No. 06-CIV-0108. (R. 106.) On October 15, 2007, the Medina common pleas court issued a judgment entry on settlement which provided that NCPS would be compensated $350,000 for the land taken by the state. The entry also contained language stating "[NCPS] do[es] hereby release any and all claims for further compensation, including interest, resulting from the construction." (Emphasis deleted.) *See* the November 29, 2011 decision, at 3. ODOT filed a motion for summary judgment in the Court of Claims' case arguing that NCPS released any and all claims arising from the August 2007 flooding as a result of that language. The Court of Claims found that the release relates only to the property acquired by ODOT and is not a legal impediment to recovery for damages to NCPS's property damaged in August 2007.

II. There was No Error in Ruling on ODOT's Summary Judgment Motion

{¶ 9} ODOT's second assignment of error contends that the Court of Claims erred in affirming the magistrate's ruling against it on its motion for summary judgment. ODOT argues the NCPS released all claims against ODOT in the settlement agreement of the eminent domain proceedings. The language ODOT relies on states:

> In consideration of the foregoing agreed compensation and damages and the additional terms and conditions outlined above, the property owner and all Defendants do hereby release any and all claims for further compensation, including interest, resulting from the construction and improvement of Interstate 71, Section 6.06, Medina County, Ohio, and from the appropriation of the property interests described herein.

(Emphasis deleted.) (R. 106, at 3.)

{¶ 10} ODOT moved for summary judgment arguing that the language of the settlement is clear and unambiguous and prevents NCPS from bringing claims for damages as a result of the August 2007 flood since the flood was a result of construction. As noted above, the trial court did not agree. NCPS argues here, as it did below, that the language does not release ODOT from the claims of this case.

{¶ 11} This is a question of contract construction. "It is axiomatic that a settlement agreement is a contract designed to terminate a claim by preventing or ending litigation and that such agreements are valid and enforceable by either party. * * * Further, settlement agreements are highly favored in the law." *Continental W. Condominium Unit Owners Assn. v. Howard E. Ferguson, Inc.*, 74 Ohio St.3d 501, 502 (1996).

{¶ 12} The construction of a written contract is a matter of law. *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241 (1978), paragraph one of the syllabus. The cardinal purpose for judicial examination of any written instrument is to ascertain and give effect to the intent of the parties. *Aultman Hosp. Assn. v. Community Mut. Ins. Co.*, 46 Ohio St.3d 51, 53 (1989). "The intent of the parties to a contract is presumed to reside in the language they chose to employ in the agreement." *Kelly v. Med. Life Ins. Co.*, 31 Ohio St.3d 130 (1987), paragraph one of the syllabus.

{¶ 13} Common words appearing in a written instrument will be given their ordinary meaning unless manifest absurdity results, or unless some other meaning is clearly evidenced from the face of overall contents of the instrument. *Alexander* at paragraph two of the syllabus. Technical terms will be given their technical meaning, unless a different intention is clearly expressed. *Cincinnati Ins. Co. v. Duffield*, 6 Ohio St. 200 (1856), paragraph one of the syllabus. "Because the interpretation of written contracts, including any assessment as to whether a contract is ambiguous, is a question

of law, it is subject to de novo review on appeal." *Sauer v. Crews*, 10th Dist. No. 12AP-320, 2012-Ohio-6257, ¶ 11, quoting *State v. Fed. Ins. Co.*, 10th Dist. No. 04AP-1350, 2005-Ohio-6807, ¶ 22. Further, de novo review is well established as the standard of review for summary judgment. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996).

{¶ 14} The common pleas court found that the settlement agreement released ODOT from all claims with respect to "the property interests described herein." (R. 106.) The property interests described in the settlement agreement were those acquired by ODOT. The Court of Claims points out that any possible damage caused by the flood to NCPS's property other than that which is identified in the settlement is not covered by the release. (R. 106.) We agree with the trial court. The language of the settlement is unambiguous in that the release only relates to the property interests described in the settlement agreement. The remainder of NCPS's property is not identified in the agreement. The trial court did not err in its summary judgment decision.

{¶ 15} ODOT's second assignment of error is overruled.

III. The Trial Court Did Not Err In Awarding Damages

{¶ 16} The Court of Claims was reasonable in awarding damages to NCPS. The award was supported by competent and credible evidence. ODOT's first assignment of error and NCPS's second cross-assignment of error are both related to damages and hence will be examined together.

{¶ 17} As a general rule, the appropriate measure of damages in a tort action is the amount which will compensate and make the plaintiff whole. *Pryor v. Webber*, 23 Ohio St.2d 104 (1970). The fundamental purpose of law is to afford to the person damaged compensation for all of the loss sustained when faced with the difficulty in determining damages. *Martin v. Design Constr. Servs., Inc.*, 121 Ohio St.3d 66, 2009-Ohio-1. A plaintiff "should be neither undercompensated nor overcompensated. Ordinarily, the injured party must be able to prove not only that he suffered a particular type of injury, but also the pecuniary value thereof." *Columbus Fin., Inc. v. Howard*, 42 Ohio St.2d 178, 184 (1975).

{¶ 18} In cases of real property, if the injury is of an irreparable nature, then damages is the difference in the market value of the property as a whole before and after the injury. *Ohio Collieries Co. v. Cocke*, 107 Ohio St. 238, 248 (1923). If the injury to the real property is "susceptible of repair, the measure of damages is the reasonable cost of restoration, plus reasonable compensation for the loss of the use of the property between the time of the injury and the restoration," unless the cost of restoration exceeds the difference in the before and after market value of the property. *Id*.

{¶ 19} In civil cases, "[j]udgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *C. E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, 280 (1978). Further, "a reviewing court must be guided by the presumption that the findings of the trial court are correct, as the trial judge is best able to view the witnesses, observe their demeanor, gestures, voice inflections, and use these observations in weighing the credibility of the proffered testimony." *Griffin v. Twin Valley Psychiatric Sys.*, 10th Dist. No. 02AP-744, 2003-Ohio-7024.

{¶ 20} The Court of Claims adopted the magistrate's damage award of $102,725.50 for repair costs ($62,140), lost net profits ($40,560.50), and $25 filing fee finding that the magistrate's approach reflects careful deliberation based upon all the relevant evidence and is supported by the greater weight of the evidence. (R. 130.) June 6, 2012 judgment entry, at 5.

{¶ 21} The cost of repairs, NCPS argues, amounted to $126,269. This included $50,550 to replace clogged drain tile that was caused by the sediment in the flood waters and $67,157 to "redo" seven fields. Seven of NCPS's fields needed new turf after the flood. NCPS testified that they did not have the capital to install new sod and opted to reseed the effected areas using their own employees. NCPS also cleaned out two drainage ditches and installed a silt fence as part of their out-of-pocket repairs. The magistrate found that:

> [T]he replacement of [the NCPS's] drain tile will be reduced to $20,000 to account for the fact that NCPS replaces drain tile each year; the fact that at least some of the drain tile was original drain tile; and that the 2007 flood only exacerbated the development of the clogs in the drain tile. The court finds that plaintiff is entitled to $4,067 to clean out the middle ditch; $1,495 for a silt fence; $3,000 to clean out the north

> ditch; $33,578 to repair its seven fields for a total amount of $62,140.

(R. 126.) Magistrate's March 30, 2012 decision, at 15.

{¶ 22} NCPS argues that it was not fully compensated by the trial court and that the magistrate erred in reducing the cost of repairs due to NCPS repairing the fields itself. NCPS also argues that it should be awarded all out-of-pocket costs. ODOT argues that damage awards for the repair costs are erroneous because the evidence is not sufficient. ODOT further argues that NCPS never needed the seven soccer fields that were damaged in the flood to hold a tournament or conduct outdoor league play and that much of repair work to the fields and the drainage system was needed anyway and not caused by the August 2007 flood.

{¶ 23} The continual replacement of clogged drainage tiles was necessary as part of NCPS's operations. Testimony was given that replacement of some tiles occurred nearly every year with some tiles dating back to the instillation of the systems in the 1950's. The 2007 flood exacerbated the problem which caused more clogging. (Tr. Vol. II, 491.) This constitutes credible evidence for the magistrate to rely on in awarding $20,000 for the replacement of tiles rather than $50,550 as argued by NCPS.

{¶ 24} The reseeding and repair of the fields was estimated by NCPS to cost $67,157, but the magistrate awarded only half that amount—$33,578. The magistrate noted that NCPS's damage estimates were not the actual cost of such work. The award for the repair was set by the magistrate "to reflect the savings to NCPS for self performing the work" and thus was the actual cost of repairs as determined by the trier of fact. (R. 126.) Magistrate's decision, at 15.

{¶ 25} We find there is some competent and credible evidence for awarding $33,578 for the repair of the seven fields rather than $67,157. The initial estimate of repairing the fields was only $48,000 from professional landscapers, Ag Design, with more work to be completed by NCPS after the initial repair. Plaintiff's exhibit No. 70.) (Tr. Vol. II, 427-29.) The estimate for the out-of-pocket expenses for the field repair was supplemented by NCPS's Quicken report sheets. A large portion of this estimate ($56,967.50), included payments to two NCPS employees for 16 months from August

2007 to December 2008. Plaintiff's exhibit No. 53. (R. 119.) These payments were made every month at the same time for the same amount, $2,418.50 to Guillermo Carrasco and $1,701.80 to Orlando Carrasco. *Id.* This would indicate that these were salaries paid by NCPS to two employees for the totality of work performed for NCPS and not only for repairs to the soccer fields damaged by ODOT.

{¶ 26} While there is evidence that these employees did perform the majority of the work in repairing the fields, there is also evidence that repair of the fields was not the only work performed at NCPS. Guillermo Carrasco, one of the principals of NCPS, was integral to NCPS operations especially with the maintenance and care of all the soccer fields. "[Guillermo Carrasco's] main role is being in charge of everything that goes down--on down at the fields, meaning any problem that we've got, whether it be water or traffic or anything else, that's his main goal. He is a soccer person, so it's great for us in that his primary thought process is the quality of the fields at the end of the day. But if there's a ditch that needs to be dug, it's [Guillermo Carrasco's] responsibility." (Tr. Vol. II, 452.)

{¶ 27} NCPS argues that the magistrate improperly reduced the award for the repair because NCPS performed the work itself. NCPS is entitled to recover the reasonable cost of restoration and the magistrate concluded that $33,578 was reasonable based on the evidence. The burden is on NCPS to present specific evidence as to the exact cost of the repairs. "Ordinarily, the injured party must be able to prove not only that he suffered a particular type of injury, but also the pecuniary value thereof." *Columbus Fin.*, at 184. The majority of the repair estimate by NCPS comes from the $56,967.50 paid to only two employees who were both employed prior to the August 2007 flood, at least one of which, Guillermo Carrasco, had a significant workload before any field repair. NCPS presented no evidence that these payments were used exclusively on repair:

> Q. [D]o you have any documents that would tell us specifically what Orlando Carrasco did on those two weeks and specifically whether or not he was working on any of the fields?
>
> A. I cannot tell you that.

(Tr. 474.)

{¶ 28} In fact, NCPS doubts that all the payments listed were used for repairs:

> Q. And did [Orlando Carrasco] work every day, sir, on fixing these fields from August 1st, 2007, until December 1st, 2008? Every day, sir?
>
> A. Again, I don't know, but I would highly doubt it.
>
> Q. So Exhibit 4C is not an accurate reflection of your damage claim in this case, correct?
>
> A. That would be a very difficult thing to get you, sir.

(Tr. Vol. II, 477.)

{¶ 29} The regular interval and amount of the payments indicates that this was a salary rather than compensation for a repair job that would require differing payment for varying amounts of work performed during payment intervals. The magistrate reasonably concluded NCPS was not entitled to the full amount. NCPS failed to present evidence of the exact repair costs at trial and the magistrate ultimately found NCPS's estimates to be too high.

{¶ 30} There is also competent, credible evidence that NCPS is entitled to $4,067 for cleaning out the middle ditch, $1,495 for installing a silt fence, and $3,000 for cleaning out the north ditch.

{¶ 31} The award of $40,560.50 for lost profit damages is supported by competent, credible evidence. The magistrate concluded that NCPS was only entitled to lost net profits for the fall 2007 season and the fall and spring season of 2008. There was testimony that the repaired fields required one year before they could be used again and the magistrate was correct in concluding there was a lack of evidence casually connecting lost net profits in 2009 and 2010 to the 2007 flood rather than to other economic factors. NCPS's expert acknowledged that all repairs were completed by at least 2010 and attributed the large lost net profits in spring 2009 to only damaged reputation and did not mention the recession. (Tr. Vol. II, 365, 368.)

{¶ 32} Having found competent, credible evidence supporting the magistrate's and the Court of Claims' decision, we find the damage award is not against the manifest weight of the evidence.

{¶ 33} ODOT's first assignment of error and NCPS's second cross-assignment of error are both overruled.

IV. There was No Error in Finding No Negligence in Construction

{¶ 34} NCPS's first assignment of error asserts that the trial court erred in finding that ODOT did not negligently design and construct Ramp E-S. It is well settled that in order to establish a cause of action for negligence, the plaintiff must show by a preponderance of evidence that "(1) the existence of a duty, (2) a breach of duty, and (3) an injury proximately resulting therefrom." *Armstrong v. Best Buy Co., Inc.*, 99 Ohio St.3d 79, 2003-Ohio-2573, ¶ 8.

{¶ 35} The trial court found that NCPS failed to present any competent evidence of such negligence. NCPS argues that ODOT breached its duty of care to properly design and construct Ramp E-S. The cases cited by NCPS represent situations where negligent maintains of completed projects resulted in flooding of property. This case is distinguishable in that the pumping of the sediment-laden water was the proximate cause of the damage to NCPS's property. There is no evidence that such a sediment-laden flood would have occurred based on failure of the ramp's temporary culverts alone without the pumping.

{¶ 36} We agree with the magistrate and the Court of Claims in that there is a lack of convincing testimony establishing that the design and construction of Ramp E-S were performed negligently.

{¶ 37} NCPS's first assignment of error is overruled.

V. NCPS Waived its Arguments for Sanctions Against ODOT

{¶ 38} NCPS waived its arguments to strike and for sanctions by failing to raise such issues in its objections to the magistrate's decision. The failure to file objections to the magistrate's decision constitutes a waiver of the right to appellate review of all but plain error. *Buford v. Singleton*, 10th Dist. No. 04AP-904, 2005-Ohio-753. NCPS argues that ODOT violated Civ.R. 11 and R.C. 2323.51 by filing a motion to amend its answer to include additional defenses based on the settlement agreement for the eminent domain

proceedings. NCPS did not make these arguments in its objections to the magistrate's decision and thus waived them on appeal. (R. 128.)

{¶ 39} NCPS's third assignment of error is overruled.

{¶ 40} Having overruled all of ODOT's and NCPS's assignments of error, we affirm the decision of the Court of Claims of Ohio.

Judgment affirmed.

BROWN and McCORMAC, JJ., concur.

McCORMAC, J., retired, formerly of the Tenth Appellate District, assigned to active duty under the authority of Ohio Constitution, Article IV, Section 6(C).