

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

Arlend Sammons, :  
 :  
 Plaintiff-Appellee, :  
 :  
 v. : No. 99AP-796  
 :  
 Board of Commissioners of Franklin : (ACCELERATED CALENDAR)  
 County et al., :  
 :  
 Defendants-Appellants. :  
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O P I N I O N

Rendered on April 18, 2000

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*Phillip L. Harmon*, for appellant.

*Ron O'Brien*, Prosecuting Attorney, and *Harland H. Hale*, for  
appellee Board of Commissioners of Franklin County.

*Janet E. Jackson*, City Attorney, *Daniel W. Drake* and  
*Todd M. Rodgers*, for appellee City of Columbus.

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APPEAL from the Franklin County Court of Common Pleas.

McCORMAC, J.

Plaintiff, Arlend Sammons, appeals, asserting as his sole assignment of error, the granting by the Court of Common Pleas of Franklin County the motions of defendants City of Columbus and Franklin County for summary judgment.

From September 1991 to October 1995, plaintiff operated a gas station and convenience store located at 331 Neil Avenue, Columbus, Ohio. Plaintiff operated the

business under an oral lease from the property owner, William Wilson. The gas station, known as the "Big House Fuel Mart," was located on the northwest corner of Neil Avenue and Dublin Avenue with ingress and egress available from both streets. The property was located on the west side of Neil Avenue which separated it from the property of the former Ohio Penitentiary.

Defendants City of Columbus and Franklin County are lessees of the Ohio Penitentiary under a lease with the state of Ohio which was executed in 1990 in which said defendants assumed a legal duty to maintain and manage the Ohio Penitentiary.

On July 6, 1994, a section of the Ohio Penitentiary's east outer wall collapsed and crashed to the ground damaging several automobiles. After that incident, the city initiated an inspection of the penitentiary's perimeter wall. As a result, the remainder of its outer wall was demolished, including the west wall across from the Big House Fuel Mart. During the demolition, Neil Avenue was closed for approximately six weeks during August and September 1994. The closure prohibited access to two of four driveways used for ingress and egress to the Big House Fuel Mart, leaving two driveways for public access still available by use of Dublin Avenue.

In August 1995, Columbia Gas was digging on the southwest corner of Dublin and Neil Avenues and detected substantial free petroleum contamination in the ground. After Columbia Gas informed the Ohio Bureau of Underground Storage Tank Regulations (hereinafter "BUSTR") of the discovery, BUSTR investigated the contamination and ordered the immediate shutdown of the fuel pumps at the Big House Fuel Mart. The property owner, Mr. Wilson, contracted with Omega Environmental to

remove the fuel tanks. The tanks were not replaced and plaintiff completely closed his business after October 1995.

We first consider the claim of plaintiff for business interruption damages during the six weeks Neil Avenue was closed while the penitentiary's perimeter wall was being razed for damages from the alleged negligence of defendants to maintain or inspect the penitentiary wall. Plaintiff contends that he is entitled to a jury trial to submit his claim for damages from partial loss of business during the six-week period as two of the four entry ways to the filling station were closed as well as for continuing damages for interruption of business until October 1995 when plaintiff no longer operated the filling station. The claim for continuing business interruption is based upon the testimony of plaintiff that his business never recovered as many of his former customers started purchasing their gas from someone else and no longer returned to his station.

There is sufficient evidence to constitute a reasonable fact for the jury to determine about whether defendants negligently failed to inspect and maintain the perimeter walls of the penitentiary. Defendants acquired this duty as a result of the lease from the owner of the former Ohio Penitentiary and, thus, undertook any duty that the owner would have a duty to anyone proximately injured by the negligent failure.

The crucial issue concerning this claim for relief is whether the damages alleged to have been sustained were reasonably foreseeable from the failure of defendants to inspect and maintain the penitentiary wall. See *Menifee v. Ohio Welding Products* (1984), 15 Ohio St.3d 75, 77. Defendants only owed a duty to prevent the type

of injuries that are reasonably foreseeable as a result of its alleged failure to maintain the wall.

When reviewing the grant of summary judgment, the principles guiding the standard of review are set forth in Civ.R. 56(C) which mandates that the following be established: (1) that there is no genuine issue of 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, viewing the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the nonmoving party. *Bostic v. Connor* (1988), 37 Ohio St.3d 144.

There are few, if any, facts in dispute concerning the collapse of the wall other than the cause for it which, as stated previously, is a question of fact for a jury. However, there must also be a factual issue for the jury that would, if resolved favorably, allow recovery of damages suffered during the time that Neil Avenue was closed and there was partial restriction of access to plaintiff's filling station. The crucial issue is that of proximate causation. Even though there is a duty and a breach of that duty, damages are not allowable unless they are proximately caused by the breach of duty attributed to defendants. In this case, there was no physical damage caused to the property which plaintiff leased. The restriction of ingress to plaintiff's filling station was partial only as there were two lanes of access from an unaffected street. The partial restriction occurred for only six weeks, a time that in all probability would have occurred even if defendants had discovered that the wall was in poor condition before its collapse as it was the razing of the perimeter wall that caused the closing of the street. Construing all facts most

favorable to plaintiff, we conclude that a reasonable finder of fact could not find a proximate compensable causation between the closure of Neil Avenue for six weeks, particularly in light of the fact that the city has a duty to keep its streets open and in repair, safe from conditions that could cause damages to ongoing users. Any alleged damages from a diminished continuation of business, allegedly because of customers going elsewhere during the six-week period, is also not compensable. For the reasons discussed previously and because they are too speculative to be compensable. Thus, plaintiff's claim for damages for negligence due to Neil Avenue being closed for six weeks while the penitentiary perimeter wall was razed was subject to summary judgment determination, there being no genuine issue of fact concerning foreseeable damages. The trial court did not err in granting summary judgment for this part of the claim.

Plaintiff further seeks damages that he alleges were proximately caused by the nuisance or trespass of defendants due to alleged underground contamination emanating from the penitentiary site proximately causing termination of his lease and damages stemming therefrom.

Plaintiff argues that there is a genuine issue of fact about whether the pollution, which resulted in the removal of the gasoline tanks at the Big House Fuel Mart site and closure of the filling station, came from leaking tanks at the filling station site or from pollution that came from the penitentiary site.

Even if there were facts giving rise to a reasonable inference that the contamination, in whole or part, came from the penitentiary site, plaintiff's claim for relief for damages incurred by the closure of the leased filling station fails as a matter of law.

The record is undisputed that BUSTR ordered plaintiff to close his pumps. The reason for the closure was not because of contamination on or around the Big House Fuel Mart and Neil Avenue but, rather, because BUSTR suspected that the tanks operated by the Big House Fuel Mart were leaking. Plaintiff admits that BUSTR would have permitted resumption of fuel sales once they were satisfied that the underground tanks were not leaking. Plaintiff or the lessor of the property could have demonstrated that the tanks were not leaking by performing a leak test on the tanks which both plaintiff and the property owner refused to do. There is no evidence that defendants ordered plaintiff to close his pumps or to mitigate any contamination, either under the Big House Fuel Mart site or under Neil or Dublin Avenues. The property owner made the independent decision to have the underground tanks removed after BUSTR ordered them closed. The decision to remove the tanks was not caused by defendants' alleged negligent maintenance of the penitentiary site, but because BUSTR believed that the tanks were leaking.

Plaintiff chose to terminate his business because he could not reach an agreement with the property owner for a long term lease. He voluntarily chose to terminate his business and his month-to-month interest in the property.

Summary judgment was properly granted to defendants on the issue of trespass or negligence in the contamination of soil from the penitentiary site. The circumstances surrounding the termination of his business were, as a matter of law, not proximately caused by defendants.

Plaintiff's assignment of error is overruled and the judgment of the trial court is affirmed.

*Judgment affirmed.*

BRYANT and DESHLER, JJ., concur.

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

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