

[Cite as *Dawson v. Cleveland*, 2011-Ohio-102.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94614

JAMES DAWSON, ET AL.

PLAINTIFFS-APPELLEES

vs.

CITY OF CLEVELAND, ET AL.

DEFENDANTS-APPELLANTS

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-668479

BEFORE: Kilbane, A.J., Blackmon, J., and Celebrezze, J.

RELEASED AND JOURNALIZED: January 13, 2011

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MARY EILEEN KILBANE, A.J.:

{¶ 1} Third-party plaintiff/defendant-appellant, Vandra Brothers Construction, appeals from the trial court's judgment granting summary judgment in favor of third-party defendant-appellee Utilicon Corporation. We affirm.

I

{¶ 2} "This action arises out of an incident that occurred on March 11, 2004 on Western Avenue in the city of Cleveland. At approximately 7:15 a.m., as he was driving to work, plaintiff-appellee, James Dawson, lost control of his car and struck a telephone pole, sustaining severe head injuries. In his complaint, Dawson alleged that he lost control of his car because he encountered large potholes in the road. He asserted negligence claims

against the City, Vandra Brothers Construction, Inc., with whom the City had contracted to perform reconstruction work on Western Avenue, and various subcontractors of Vandra Brothers.” *Dawson v. Cleveland*, Cuyahoga App. No. 94510, 2010-Ohio-5142, ¶2.¹

{¶ 3} In his complaint, Dawson alleged that the City “negligently allowed a condition(s) to exist on Western Avenue that was dangerous and hazardous, and which rendered the street unsafe for ordinary travel.” (Some punctuation omitted.) He further alleged that Vandra Brothers “had a duty to warn motorists of the construction underway, or about to be underway, on Western Avenue and a duty to provide proper signage, barricades and means by which traffic could safely travel along Western Avenue.”

{¶ 4} Vandra Brothers denied the allegations, but filed a third-party complaint against Utilicon, seeking indemnification and contribution. Specifically, Vandra Brothers alleged that Utilicon was a subcontractor on the project and “furnish[ed] labor, equipment and material to complete road repair construction at or about an area on Western Avenue in the City of Cleveland on or about March 11, 2004.” Vandra Brothers further alleged that Utilicon

¹That appeal related to the trial court’s judgment denying the City’s motion for summary judgment.

“agreed to properly guard against and prevent accident and injury to persons arising out of [Utilicon’s] work at the aforementioned location.”²

{¶ 5} In its answer, Utilicon admitted that it entered into a subcontract agreement with Vandra Brothers on the Western Avenue project, but denied the remaining allegations contained in Vandra Brothers’ third-party complaint.

{¶ 6} Utilicon filed a motion for summary judgment on Vandra Brothers’ third-party complaint.³ The trial court granted Utilicon’s motion. For its sole assignment of error, Vandra Brothers contends that the trial court erred in granting Utilicon’s motion.

II

{¶ 7} Summary judgment is appropriate when, looking at the evidence as a whole, (1) no genuine issue of material fact remains to be litigated, (2) the

²Vandra Brothers also alleged in its third-party complaint that it was entitled to indemnification “pursuant to the terms of the Certificate of Liability Insurance contract between it and Utilicon.” Vandra Brothers abandoned this claim, however. The certificate of insurance that was attached to its third-party complaint was dated November 24, 2004 (after Dawson’s accident) and stated, in part, “this certificate is issued as a matter of information only and confers no rights upon the certificate holder.” Further, the certificate did not list policies of insurance in effect on the date of Dawson’s accident.

³Vandra Brothers filed a motion for summary judgment on Dawson’s complaint. The trial court denied the motion. It is well established that the denial of a summary judgment motion is not a final appealable order. See *Dawson*, supra, at ¶12; *Balson v. Dodds* (1980), 62 Ohio St.2d 287, 289, 405 N.E.2d 293; *Celebrezze v. Netzley* (1990), 51 Ohio St.3d 89, 90, 554 N.E.2d 1292; R.C. 2505.02. Thus, our review here is focused solely on the summary judgment exercise involving Utilicon and Vandra Brothers and we have not considered the references in the briefs to the summary

moving party is entitled to judgment as a matter of law, and (3) construing the evidence most strongly in favor of the nonmoving party, it appears that reasonable minds could only conclude in favor of the moving party. Civ.R. 56(C). The only evidence to be considered in deciding summary judgment is that found in the “pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action.” Civ.R. 56(C).

{¶ 8} The party moving for summary judgment carries an initial burden of setting forth specific facts that demonstrate his or her entitlement to summary judgment. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 1996-Ohio-107, 662 N.E.2d 264. If the moving party fails to meet this burden, summary judgment is not appropriate; if the moving party does meet this burden, summary judgment will be appropriate only if the nonmoving party fails to establish the existence of a genuine issue of material fact. *Id.* at 293.

III

{¶ 9} Vandra Brothers contends that the trial court erred in granting Utilicon’s summary judgment motion because there were genuine issues of material fact regarding whether Utilicon exercised ordinary care in maintaining traffic at the construction site.

judgment exercise between Vandra Brothers and Dawson.

{¶ 10} Utilicon submitted the following in support of its motion for summary judgment: (1) the deposition testimonies of Dawson, Robert Ianetta (a construction inspector for the City), Anthony Melaragno (Vandra Brothers' president), and Roger Derosett (an eyewitness to the accident); and (2) the affidavit of Joseph Cortese, Utilicon's vice president. That evidence established the following.

{¶ 11} Dawson has no recollection of the accident and he does not know what caused him to lose control of his vehicle. The eyewitness to the accident, Derosett, testified that the street was under construction, although no work was being performed at the time of the accident. According to Derosett, Dawson's car hit "potholes" on the road and veered out of its lane into a lane in the opposite direction. Dawson then gained control of his vehicle, went back into his lane, but lost control again, went into the lane in the opposite direction, and ultimately "slammed into a telephone pole."

{¶ 12} Melaragno, Vandra Brothers' president, testified that the City awarded Vandra Brothers the contract to "rehab" Western Avenue in December 2003, but it did not start its work until after Dawson's accident, in July 2004. Melaragno testified that Vandra Brothers contracted with Utilicon to do work on the waterline, and that Utilicon may have started its work in February 2004, prior to Dawson's accident. According to Melaragno, it was Vandra Brothers', not Utilicon's, responsibility for traffic control while

construction was underway. For example, Melaragno testified that prior to Utilicon starting its work, Vandra Brothers set up traffic signs to alert drivers that road work was going to be performed.

{¶ 13} Melaragno further testified that at the end of a workday, Utilicon was responsible for “protecting its work area,” and to that end, Utilicon would place a steel plate over its work area or “backfill a hole and patch it with a cold patch” at the end of a workday. Melaragno testified that if Dawson drove into a pothole, Utilicon had nothing to do with the pothole.

{¶ 14} Cortese, Utilicon’s vice president, averred that Utilicon did not agree to warn drivers of, or place barricades around, potholes on Western Avenue. Cortese further averred that to the knowledge of the company, it did not do anything to cause Dawson’s accident.

{¶ 15} Ianetta, the City’s construction inspector, testified that Utilicon’s work would not have created a problem for traffic, and even if the street should have been closed, Utilicon had neither the right nor the duty to close a city street.

{¶ 16} Vandra Brothers filed a brief in opposition to Utilicon’s summary judgment motion. In that brief, Vandra Brothers contended that, because the evidence demonstrated that Utilicon was the only contractor working at the site at the time of Dawson’s accident, “if Vandra Brothers is found liable to [Dawson] for injuries resulting from *Utilicon’s holes*, then of course, Utilicon is

liable to Vandra Brothers on its indemnity and contribution claims.” (Emphasis added.) But Vandra Brothers contended that it was its “immutable position * * * that neither Vandra Brothers [n]or Utilicon is responsible for the injuries sustained by [Dawson] * * *.” Vandra Brothers did not present any evidence to its brief in opposition.

{¶ 17} Although Dawson did not have any claims against Utilicon, he filed a brief in opposition to its motion for summary judgment. In his brief, Dawson alleged that “Utilicon’s work created a condition that made navigating the holes [in the road] more difficult if not insurmountable * * *.” Dawson contended that there were three questions of material fact “relating to [the] duty owed by Third-Party Defendant Utilicon and Defendant Vandra Brothers” that should have precluded the court from granting summary judgment in favor of Utilicon: (1) whether additional signage should have been placed once Utilicon started its work; (2) whether the barrels “interfered with the ability of drivers to safely drive down the roadway”; and (3) “whether traffic should have been rerouted * * *.” Dawson relied on the deposition testimonies of Melaragno (Vandra Brothers’ president) and Derosett (the eyewitness).

{¶ 18} Vandra Brothers’ claims against Utilicon were for indemnity and contribution. Contribution is based on statute and can be used when two defendants contribute to a single indivisible injury. R.C. 2307.22.

Indemnification is a common law doctrine based upon primary and secondary liability. *Motorists Mut. Ins. Co. v. Huron Rd. Hosp.* (1995), 73 Ohio St.3d 391, 394, 653 N.E.2d 235. Under the doctrine of indemnification, the principal, from whom the plaintiff seeks to recover, is only secondarily or passively liable and able to seek reimbursement from the agent who is primarily or actively liable. See *Krasny-Kaplan Corp. v. Flo-Tork, Inc.* (1993), 66 Ohio St.3d 75, 78, 609 N.E.2d 152.

{¶ 19} To sustain a claim for negligence, the plaintiff must prove (1) the existence of a duty, (2) breach of the duty, (3) proximate cause, and (4) damages. *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.*, 81 Ohio St.3d 677, 680, 1998-Ohio-602, 693 N.E.2d 271.

{¶ 20} In its entry granting Utilicon's summary judgment motion, the trial court found the following: "Neither [Dawson] nor third party plaintiff Vandra Brothers have provided sufficient evidence to support the claim that an act or omission of third party defendant Utilicon Corporation caused [Dawson] to lose control of his vehicle.

{¶ 21} "Neither [Dawson] nor third party plaintiff Vandra Brothers provided any evidence demonstrating third party defendant Utilicon Corporation's duty [to] maintain the area where the accident occurred or a duty to warn of or barricade any potholes. It is undisputed that the third party defendant did have a duty to protect its work area. Third party

defendant Utilicon via affidavit specified it was the company's policy to either place a steel plate over the work area or backfill and cap the area. Moreover the affidavit submitted by third party defendant Utilicon[] also denied any awareness of having done anything to cause [Dawson] to crash. Neither [Dawson] nor third party plaintiff produced any evidence, either in the form of contracts, deposition, affidavit, interrogatories, or * * * admissions, disputing the affidavit submitted [by] third party defendant Utilicon corporation[']s representative. [Dawson] and third party plaintiff * * * have failed to show a genuine issue of material fact demonstrating third party defendant Utilicon Corporation[']s failure to exercise ordinary care in maintaining their work area."

{¶ 22} We agree with the trial court. Simply put, the evidence submitted by Utilicon demonstrated that its duty was to "protect its work area," and it fulfilled that duty by covering its area with a steel plate or backfilling and capping it at the end of each work day. The evidence submitted by Utilicon further demonstrated that nothing it did was the cause of Dawson's accident. Vandra Brothers did not present any evidence to demonstrate otherwise.

{¶ 23} Moreover, Dawson did not present any evidence demonstrating that Utilicon owed a duty to him regarding signage, the placement of barrels,

or the rerouting of traffic through or around the construction zone.⁴ Thus, neither Vandra Brothers nor Dawson demonstrated that Utilicon was negligent such that it contributed to a single indivisible injury to Dawson (contribution) or was primarily or actively liable for Dawson's injury (indemnification).

{¶ 24} In light of the above, the trial court did not err in granting Utilicon's motion for summary judgment and Vandra Brothers' assignment of error is overruled.

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 be sent to said 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.

MARY EILEEN KILBANE, ADMINISTRATIVE JUDGE

PATRICIA A. BLACKMON, J., and
FRANK D. CELEBREZZE, JR., J., CONCUR

⁴No Utilicon representative was deposed and Dawson did not provide expert testimony that Utilicon breached a duty owed to him or acted below the standard of care for a construction subcontractor.