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JUSTIN F. ROEBEL
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IN THE COURT OF APPEALS OF INDIANA

JOSEPH MATTHEWS,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 49A02-1002-CT-110
	)	
CITY OF INDIANAPOLIS,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable S.K. Reid, Judge
Cause No. 49D14-0801-CT-138

July 16, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Joseph Matthews appeals the trial court's grant of summary judgment to the City of Indianapolis ("the City"). Matthews raises a single issue for our review, which we restate as the following three issues:

1. Whether a genuine issue of material fact exists regarding whether the City owed Matthews a duty to replace a missing stop sign;

2. Whether there is a genuine issue of material fact on the question of proximate causation; and

3. Whether a genuine issue of material fact precluded summary judgment on the City's contention that Matthews was contributorily negligent.

We conclude that the City failed to demonstrate that there were no genuine issues of material fact and, therefore, we hold that the City was not entitled to summary judgment. Accordingly, we reverse and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

On May 7, 2006, Matthews was driving his motorcycle east on Bates Street in Indianapolis near its intersection with Olive Street, an area with which he was familiar. South of Bates Street, Olive Street is about fifty yards long and ends at a railroad track. That day, there was no stop sign on Olive Street as one drove north into the intersection with Bates Street, nor was a stop line painted on the road. However, when Matthews had driven through the intersection in the past, traffic going north on Olive Street had always stopped before entering the intersection.

As Matthews neared the intersection, a tow truck was travelling north on Olive Street. Matthews could not see the truck from his position on Bates Street, however,

because a van had been parked on Bates Street in a location that obstructed the view south along Olive Street. The tow truck entered the intersection of Olive and Bates without stopping, and Matthews collided with the truck. He suffered multiple serious injuries as a result of the collision.

On January 2, 2008, Matthews filed this action against the City, alleging that the City negligently failed to place or replace a stop sign on Olive Street at the intersection with Bates Street and that that failure proximately caused his injuries. In the course of discovery, Matthews deposed Robert Coolman, the 2006 Department of Public Works' Manager of Operations for Traffic Signs. According to Coolman, a city ordinance required a stop sign for northbound traffic on Olive Street at the intersection with Bates Street. Further, the City employed eight sign maintenance employees—two for each quadrant of the City—to look for missing and damaged traffic signs and to maintain and replace those signs. The stop sign at the intersection of Bates and Olive had been replaced in 1998 and either that stop sign or another sign at that intersection was replaced in 2000. However, after the 2000 replacement, there is no record of a request to replace a missing stop sign at that intersection. Nonetheless, one nearby business owner stated that the sign had been missing for ten years. And an employee at that same business stated that she had not seen a sign at the southeastern corner of the intersection in her three years of employment there.

On November 16, 2009, the City moved for summary judgment on Matthews's claim. After Matthews filed his response, the trial court granted the City's motion on January 8, 2010, without a hearing. This appeal ensued.

DISCUSSION AND DECISION

Standard of Review

Matthews appeals the trial court's grant of summary judgment to the City. Our standard of review for summary judgment appeals is well established:

> When reviewing a grant of summary judgment, our standard of review is the same as that of the trial court. Considering only those facts that the parties designated to the trial court, we must determine whether there is a "genuine issue as to any material fact" and whether "the moving party is entitled to a judgment a matter of law." In answering these questions, the reviewing court construes all factual inferences in the non-moving party's favor and resolves all doubts as to the existence of a material issue against the moving party. The moving party bears the burden of making a prima facie showing that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law; and once the movant satisfies the burden, the burden then shifts to the non-moving party to designate and produce evidence of facts showing the existence of a genuine issue of material fact.

Dreaded, Inc. v. St. Paul Guardian Ins. Co., 904 N.E.2d 1267, 1269-70 (Ind. 2009) (citations omitted). The party appealing from a summary judgment decision has the burden of persuading this court that the grant or denial of summary judgment was erroneous. Knoebel v. Clark County Superior Court No. 1, 901 N.E.2d 529, 531-32 (Ind. Ct. App. 2009).

Matthews maintains that the City acted negligently in its failure to place or replace a stop sign on Olive Street. Matthews's burden on his negligence claim is well settled:

> To prevail on a claim of negligence a plaintiff is required to prove: (1) a duty owed by the defendant to the plaintiff; (2) a breach of that duty by the defendant; and (3) an injury to the plaintiff proximately caused by the breach. A negligent act is the proximate cause of an injury if the injury is a natural and probable consequence, which in light of the circumstances, should have been foreseen or anticipated.

> Summary judgment is rarely appropriate in negligence cases. Issues of negligence, contributory negligence, causation, and reasonable care are more appropriately left for the determination of a trier of fact.

Humphery v. Duke Energy Ind., Inc., 916 N.E.2d 290-91 (Ind. Ct. App. 2009) (citing Florio v. Tilley, 875 N.E.2d 253, 255 (Ind. Ct. App. 2007)).

Here, the parties dispute three issues: (1) whether the City had constructive notice of the missing stop sign and, therefore, had a duty to replace the sign; (2) whether the missing sign proximately caused Matthews's injuries; and (3) whether Matthews was contributorily negligent. The parties do not dispute that if the City owed Matthews a duty then it breached that duty. We address the parties' three contentions in turn.

Issue One: Duty

The parties first dispute the existence of a duty owed by the City to Matthews. In particular, the parties dispute whether the City had constructive notice of the missing stop sign. As we have discussed:

> The state and its counties have a duty to maintain and repair roads within their control. Included in this duty is the obligation to maintain and repair traffic control signals, including stop signs. However, the duty does not attach unless the city has actual or constructive notice of a dangerous situation.

Utley v. Healy, 663 N.E.2d 229, 232-33 (Ind. Ct. App. 1996) (citations omitted), trans. denied. The City will be charged with constructive notice if:

> The condition is of such a nature the state authorities or its agents could[,] in the exercise of reasonable diligence, have discovered and corrected it. . . . Where there is actual or constructive knowledge of an unsafe condition, there is a breach of the duty of care if the state does not act. On the other hand, where there is neither actual nor constructive knowledge of a dangerous condition, so that even the reasonably prudent person would not have been alerted to action, then there is no negligence.

Miller v. Ind. State Highway Dep't, 507 N.E.2d 1009, 1013 (Ind. Ct. App. 1987) (quotation omitted; omission original). Thus, the question here is whether the City, in the exercise of reasonable diligence, could have discovered the missing stop sign and corrected it. See id.

The City contends that its exercise of reasonable diligence would not have alerted its employees of the missing stop sign. Specifically, the City argues that the sign was on

> a dead end alley that ends with a dirt access path to the back of a couple of houses and businesses abutting a railroad track. There is no stop line painted on the road to make it obvious that a stop sign should be present. The evidence also indicates there had been no sign there at least ten years, yet no one ever complained about a missing sign.

Appellee's Br. at 18. Similarly, the City argues that the missing stop sign was a "hidden defect" because "the defective nature was not readily apparent." Id. at 21.

We agree with the City that one inference from the designated facts suggests that the City may not have had constructive notice. But another inference suggests that it might have had constructive notice. Namely, a city ordinance required a stop sign at the location; the City hired employees to "look for missing and damaged signs," Appellee's Br. at 7; those employees had replaced a stop sign at the southeastern corner of Olive and Bates in 1998; and nearby workers stated that three to ten years had passed since the stop sign had disappeared. The passage of time can be "sufficient to charge the city with constructive notice" of a negligent condition. See Utley, 663 N.E.2d at 237. Those facts, taken together, suggest that the City might have discovered the missing stop sign in the exercise of reasonable diligence. Thus, a genuine question of material fact exists as to

whether the City had constructive notice of the missing stop sign and, therefore, a duty to Matthews to replace it.

We briefly note that the City also argues that the only way it could have discovered the missing stop sign was through an expensive inventory of signage, and that the City's decision in how to spend its "limited funds is protected under Indiana law as a discretionary function." See Appellee's Br. at 19-20. We acknowledge the City's limited funds but, of course, that is not an affirmative defense to a tort.[1] We do not hold that the City is necessarily liable to Matthews or that the City is required to reallocate its funds to improve its method of finding missing signage. Rather, on this issue we hold only that a genuine issue of material fact exists as to whether the City had constructive notice of the missing stop sign. The City may, of course, present its arguments on why it did not have constructive notice to the jury for its consideration.

Issue Two: Proximate Causation

The parties next dispute whether the missing stop sign might have proximately caused Matthews's injuries. As our Supreme Court has discussed:

> "Proximate cause" has two components: causation-in-fact and scope of liability. To establish factual causation, the plaintiff must show that but for the defendant's allegedly tortious act or omission, the injury at issue would not have occurred. The scope of liability doctrine asks whether the injury was a natural and probable consequence of the defendant's conduct, which in the light of the circumstances, should have been foreseen or anticipated. Liability is not imposed on the defendant if the ultimate injury was not reasonably foreseeable as a consequence of the act or omission. Causation-in-fact is ordinarily a factual question reserved for determination by the jury. However, where reasonable minds cannot disagree as to causation-in-fact, the issue may become a question of law for the court.

[1] The City does not suggest that discretionary function immunity applies to this appeal.

Kovach v. Caligor Midwest, 913 N.E.2d 193, 197-98 (Ind. 2009) (citations omitted). Here, the City disputes only whether the designated evidence demonstrated a genuine issue of material fact on the question of causation-in-fact.

In his deposition testimony, Matthews testified that "the tow truck appeared immediately"; the truck was travelling "between five and ten miles an hour"; and the truck "pulled directly in front of me and stopped . . . immediately in front of me." Appellant's App. at 27-28. In light of that testimony, the City argues that it is entitled to summary judgment because Matthews "has no designated evidence that the truck failed to stop." Appellee's Br. at 12. The City then states that, instead, Matthews "is asking this Court to speculate and infer from a negligent condition—the missing stop sign—that the negligent condition caused the accident." Id. The City further suggests that "the reasonable inference [is] that the tow truck stopped at the intersection." Id. at 14.[2]

Again, summary judgment is not an ultimate determination on the facts. The only question is whether a genuine issue of material fact exists. On these facts, an equally plausible theory is that, because there was no stop sign, the tow truck driver entered the Bates Street-Olive Street intersection without stopping, thereby causing Matthews's injuries. But for the missing stop sign, then, Matthews's injuries would not have occurred. See Kovach, 913 N.E.2d at 197-98. As such, we hold that a genuine issue of material fact exists on the question of proximate causation.

[2] The City does not clearly argue, and we therefore do not consider, whether the driver of the tow truck acted negligently by not yielding to traffic on Bates Street. See Ind. Appellate Rule 46(A)(8)(a); Humphery, 916 N.E.2d at 295 (discussing intervening causes).

Issue Three: Contributory Negligence

Finally, the City argues that Matthews acted with contributory negligence and that his conduct is a total bar to his suit against the City. Specifically, the City states that Matthews "knowingly entered an intersection which he described as being so obstructed that he could not see a large, slow moving tow truck until the tow truck was in the middle of the intersection." Appellee's Br. at 23-24. Our Supreme Court has discussed contributory negligence as follows:

> A plaintiff is contributorily negligent when the plaintiff's conduct "falls below the standard to which he should conform for his own protection and safety. Lack of reasonable care that an ordinary person would exercise in like or similar circumstances is the factor upon which the presence or absence of negligence depends." Expressed another way, "[c]ontributory negligence is the failure of a person to exercise for his own safety that degree of care and caution which an ordinary, reasonable, and prudent person in a similar situation would exercise."
>
> Contributory negligence is generally a question of fact and is not an appropriate matter for summary judgment "if there are conflicting factual inferences." "However, where the facts are undisputed and only a single inference can reasonably be drawn therefrom, the question of contributory negligence becomes one of law."

Funston v. Sch. Town of Munster, 849 N.E.2d 595, 598-99 (Ind. 2006) (citations omitted; alteration original). Because Matthews is suing the City, a governmental defendant, "even a slight degree of negligence on the part of [the plaintiff], if proximately contributing to his claimed damages, will operate as a total bar to [his] action for damages . . . ." Id. at 598.

As with the other two issues, while the City's arguments might win the day with a jury, they are not appropriate for resolution of the issues on summary judgment. On these facts, Matthews had the right of way and, as such, was the preferred driver, and it is

clear that Indiana law "does not require a person lawfully operating a motor vehicle on a preferred street or highway to turn her head and look to the right and to the left before entering and traversing any non-preferred street intersecting the preferred highway." McDonald v. Lattire, 844 N.E.2d 206, 213 (Ind. Ct. App. 2006); see also Wilkerson v. Harvey, 814 N.E.2d 686, 690-92 (Ind. Ct. App. 2004) (stating that the preferred driver "has the right to assume the non-preferred driver will obey the traffic laws, and [he] is not required to proceed overly cautiously into an intersection"), trans. denied. The relevance, if any, of Matthews's speed and the obstruction of his view are questions of fact for the jury to consider.

Conclusion

In sum, we hold that the trial court erred when it granted summary judgment to the City. Genuine issues of material fact exist on the questions of the City's constructive notice of the missing stop sign, whether the missing stop sign proximately caused Matthews's injuries, and whether Matthews was contributorily negligent. Hence, we reverse and remand for further proceedings.

Reversed and remanded.

VAIDIK, J., and BROWN, J., concur.