[Cite as *Grimmer v. Rocky River*, 2010-Ohio-4683.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94271

WILLIAM E. GRIMMER, ET AL.

PLAINTIFFS-APPELLANTS

vs.

CITY OF ROCKY RIVER, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-644384

BEFORE: Celebrezze, J., Kilbane, P.J., and Sweeney, J.

RELEASED AND JOURNALIZED: September 30, 2010

ATTORNEY FOR APPELLANTS

Henry W. Chamberlain
Chamberlain Law Firm
526 Superior Avenue
620 Leader Building
Cleveland, Ohio 44114

ATTORNEYS FOR APPELLEES

Andrew D. Bemer
Seeley, Savidge, Ebert & Gourash Co.
26600 Detroit Road
3rd Floor
Cleveland, Ohio 44145

Timothy J. Fitzgerald
Gallagher Sharp
6th Floor, Bulkley Building
1501 Euclid Avenue
Cleveland, Ohio 44115

Kathleen M. Guarente
Park Center Plaza II
Suite 450
6150 Oak Tree Boulevard
Independence, Ohio 44131

FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Plaintiffs-appellants, William E. Grimmer, Donna Grimmer, and David Grimmer, appeal the grant of summary judgment in favor of appellee, the city of Rocky River ("Rocky River"). Appellants' claim arose out of a

single car accident allegedly caused by an accumulation of ice on a public roadway from a leaking fire hydrant. After a thorough review of the record and based on the following law, we find that summary judgment was inappropriate to dispose of the case.

{¶ 2} In January 2003, the city of Cleveland's Division of Water ("CDW") received a complaint that a fire hydrant near the intersection of Lake Road and Breezevale Cove in the city of Rocky River was leaking. An inspection was undertaken and repairs attempted. On January 31, 2003, a six foot by seven foot cut was made into the right east-bound lane of Lake Road, and an orange barrel was placed in the road at the site. Two affidavits averred that a flashing sign was placed some distance west of the barrel advising drivers to merge left. On February 7, 2003, CDW receivied additional complaints, and it was determined that the hydrant was still leaking. It was finally fixed on February 18, 2003.

{¶ 3} On the morning of February 11, 2003, William Grimmer was traveling to school, taking the same route that he had taken over the previous weeks. William got into the right-hand, eastbound lane after Lake Road transitioned from a two-lane to a four-lane road. William stated that he saw the orange barrel ahead and attempted to change lanes, but was prevented from doing so by another car in the left-hand lane. He applied his breaks to allow the other car to pass before changing lanes. When he applied his

breaks, he lost control of the car and crashed into a utility pole. William D. Bonezzi, a family friend, was driving a short distance ahead of William and witnessed the crash in his rear-view mirror. Bonezzi averred that he stopped to help William and noticed ice on the road an unspecified distance west of the leaking hydrant in the right-hand lane.

{¶ 4} Appellants filed suit against both Rocky River and Cleveland. Appellees moved for summary judgment in July 2008. Rocky River's motion for summary judgment was granted on December 29, 2008. Cleveland's motion was denied, and it eventually settled with appellants and was dismissed from the action. Appellants then filed the instant appeal assigning two errors for review. For ease of discussion, appellants' assigned errors will be addressed out of order.

Law and Analysis

{¶ 5} Appellants are appealing from the grant of summary judgment in favor of Rocky River. "Civ.R. 56(C) specifically provides that before summary judgment may be granted, it must be determined that: (1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for

summary judgment is made, that conclusion is adverse to that party." *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267.

{¶ 6} It is well established that the party seeking summary judgment bears the burden of demonstrating that no issues of material fact exist for trial. *Celotex Corp. v. Catrett* (1986), 477 U.S. 317, 330, 106 S.Ct. 2548, 91 L.Ed.2d 265; *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 115, 526 N.E.2d 798. In *Dresher v. Burt*, 75 Ohio St.3d 280, 1996-Ohio-107, 662 N.E.2d 264, the Ohio Supreme Court modified and/or clarified the summary judgment standard as applied in *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, 570 N.E.2d 1095. Under *Dresher*, "the moving party bears the initial responsibility of informing the trial court of the basis for the motion, *and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim*." (Emphasis sic.) Id. at 296. The nonmoving party has a reciprocal burden of specificity and cannot rest on mere allegations or denials in the pleadings. Id. at 293. The nonmoving party must set forth "specific facts" by the means listed in Civ.R. 56(C) showing a genuine issue for trial exists. Id.

{¶ 7} This court reviews the lower court's granting of summary judgment de novo. *Brown v. Scioto Cty. Commrs.* (1993), 87 Ohio App.3d 704, 622 N.E.2d 1153. An appellate court reviewing the grant of summary judgment must follow the standards set forth in Civ.R. 56(C). "The

reviewing court evaluates the record * * * in a light most favorable to the nonmoving party. * * * [T]he motion must be overruled if reasonable minds could find for the party opposing the motion." *Saunders v. McFaul* (1990), 71 Ohio App.3d 46, 50, 593 N.E.2d 24.

Governmental Immunity

{¶ 8} Appellants argue that "the trial court erred in granting [Rocky River's] motion for summary judgment based on [Rocky River's] argument that immunity applies under Ohio Revised Code §2744, and that [Rocky River] properly maintained the roadway."

{¶ 9} Rocky River has a statutory duty to maintain the roads within its borders. R.C. 723.01 states that "[m]unicipal corporations shall have special power to regulate the use of the streets. Except as provided in section 5501.49 of the Revised Code, the legislative authority of a municipal corporation shall have the care, supervision, and control of the public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts, and viaducts within the municipal corporation." This section then goes on to state, "[t]he liability or immunity from liability of a municipal corporation for injury, death, or loss to person or property allegedly caused by a failure to perform the responsibilities imposed by this section shall be determined pursuant to divisions (A) and (B)(3) of section 2744.02 of the Revised Code." Id.

{¶ 10} R.C. 2744 grants governmental immunity to political subdivisions. There is a three-tiered analysis to determine whether immunity applies. Under R.C. 2744.02(A)(1), the first tier requires that the defendant be a political subdivision. *Elston v. Howland Local Schools*, 113 Ohio St.3d 314, 2007-Ohio-2070, 865 N.E.2d 845, ¶10. The second tier focuses on exceptions to immunity under R.C. 2744.02(B). Id. at ¶11. Finally, under the third tier, if an exception was found to exist, immunity may be restored if the political subdivision asserts a defense under R.C. 2744.03. Id. at ¶12.

{¶ 11} Under R.C. 2744.02(A)(1), "a political subdivision is not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by an act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function."

{¶ 12} R.C. 2744.01(F) states that "'political subdivision' or 'subdivision' means a municipal corporation, township, county, school district, or other body corporate and politic responsible for governmental activities in a geographic area smaller than that of the state." R.C. 2744.01(C)(2)(e) defines one "governmental function" as "[t]he regulation of the use of, and the maintenance and repair of, roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, and public grounds"; and R.C.

2744.01(C)(2)(j) defines "governmental function" to include the "[t]he regulation of traffic, and the erection or nonerection of traffic signs, signals, or control devices[.]"

{¶ 13} Under R.C. 2744.02(B), one of the five exceptions that would make a political subdivision, otherwise eligible for immunity, liable for damages is the political subdivision's negligent failure to keep public roads in repair. The version of R.C. 2744.02(B)(3) in effect at the time of the accident provided that "political subdivisions are liable for injury, death, or loss to person or property caused by their failure to keep public roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, or public grounds within the political subdivisions open, in repair, and free from nuisance * * *."

{¶ 14} The focus of this analysis "'should be on whether a condition exists within the political subdivision's control that creates a danger for ordinary traffic on the regularly travelled [sic] portion of the road.'" *Taddeo v. Estate of Ellis* (2000), 144 Ohio App.3d 235, 242-243, 759 N.E.2d 1266, quoting *Mfr.'s Natl. Bank of Detroit v. Erie Cty. Road Comm.* (1992), 63 Ohio St.3d 318, 322, 587 N.E.2d 819, 823.

{¶ 15} The municipality must exercise ordinary care "to keep its streets, sidewalks, and other public ways open, in repair, and free from nuisance." *Maley v. Village of Wyoming* (1951), 88 Ohio App. 383, 384, 99 N.E.2d 792.

The abrogation of immunity only arises "upon proof that [a municipality or] its agents or officers actively created the faulty condition, or that it was otherwise caused and the municipality has actual or constructive notice of its existence." *City of Cleveland v. Amato* (1931), 123 Ohio St. 575, 577, 176 N.E. 227.

{¶ 16} In order for appellants to show that immunity does not apply, they must demonstrate that: (1) an unnatural accumulation of ice[1] formed on the regularly-traveled portion of the road that constituted a dangerous condition, (2) of which Rocky River had actual or constructive notice, (3) and this condition caused William's accident.

{¶ 17} In support of their claims, appellants submitted affidavits and deposition testimony alleging that Rocky River had notice for at least two weeks that the fire hydrant located at 22455 Lake Road was leaking, that water had run down the road west of the hydrant in the right-hand lane of Lake Road, that this pooling water could freeze and create an unnatural accumulation of ice,[2] which ultimately caused William's accident. While

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[1]"Unnatural accumulations are caused by a person doing something that would cause ice and snow to accumulate in an unexpected place or way." *Mubarak v. Giant Eagle, Inc.*, Cuyahoga App. No. 84179, 2004-Ohio-6011, ¶19, citing *Porter v. Miller* (1983), 13 Ohio App.3d 93, 468 N.E.2d 134.

[2]Appellants cite to case law dealing with natural accumulations of ice and snow where Ohio courts, including this one, have rejected claims against municipalities. See *Greslick v. Sudano* (Dec. 24, 1998), Cuyahoga App. No. 73353.

Rocky River correctly asserts that the hydrant was not under its control, the roadway on which the water from the leaking hydrant accumulated was. Appellants' evidence shows that the road was otherwise dry and free from ice and snow except in the area around the leaking hydrant, which resulted in an unnatural accumulation of ice. Rocky River's evidence shows that they had placed an orange barrel in the right-hand lane, closing it off, as well as placing a "keep left" sign some distance west of the site of the accident. Rocky River also submitted an affidavit showing that it had caused Lake Road to be salted shortly before the accident.

{¶ 18} Examining the evidence presented in a light most favorable to appellants, it is unclear at this time whether Rocky River is entitled to immunity. There remains a material question of fact regarding the distance of any ice from the barrel and the existence and distance of any warning signs placed along the road.[3] These precautions taken by Rocky River could result in the shield of governmental immunity, but there remains a question of whether Rocky River took adequate measures so that motorists would not encounter a nuisance on the roadway resulting from the leaking hydrant.

[3]Rocky River did provide an affidavit that provided a general location for the disputed sign, but not in relation to the alleged ice.

Open and Obvious

{¶ 19} Appellants also claim that "the trial court erred in granting [Rocky River's] motion for summary judgment based on [Rocky River's] argument that the cause of [appellants'] injury was of an open and obvious nature."

{¶ 20} In discussing liability of a business owner in a negligence action involving winter conditions, this court has stated that "[s]now and ice are part of wintertime life in Ohio. *Lopatcovich* [sic] *v. Tiffen* (1986), 28 Ohio St.3d 204, 503 N.E.2d 154. As a general rule, 'dangers from natural accumulations of ice and snow are ordinarily so obvious and apparent that an occupier of [the] premises may reasonably expect that a business invitee on the premises will discover those dangers and protect himself against them.' *Sidle v. Humphrey* (1968), 13 Ohio St.2d 45, 233 N.E.2d 589, paragraph two of the syllabus. * * * A[n] * * * exception to the no-duty rule exists where the owner is actively negligent in permitting or creating an unnatural accumulation of ice and snow. *Lopatkovich v. City of Tiffin*, supra. An 'unnatural accumulation' refers to causes and factors other than winter weather's low temperatures, strong winds, drifting snow, and natural thaw and freeze cycles. By definition, an unnatural condition is man-made or man-caused." *Mubarak v. Giant Eagle, Inc.*, Cuyahoga App. No. 84179, 2004-Ohio-6011, ¶18-19.

{¶ 21} The open-and-obvious doctrine stands for the proposition that owners and occupiers of land have no duty to warn others of open and obvious dangers on their property. *Simmers v. Bentley Constr. Co.*, 64 Ohio St.3d 642, 644, 1992-Ohio-42, 597 N.E.2d 504. The justification for this doctrine is that "the open and obvious nature of the hazard itself serves as a warning. Thus, the owner or occupier may reasonably expect that persons entering the premises will discover those dangers and take appropriate measures to protect themselves." Id. A plaintiff does not have to actually observe a condition for it to be considered open and obvious. *Leonard v. Modene & Assoc., Inc.*, Wood App. No. WD-05-085, 2006-Ohio-5471, ¶53. "The determining factor is whether the condition is or *could have been* seen, if the injured party had looked." (Emphasis sic.) Id.

{¶ 22} Whether a condition is open and obvious is often a question of law. *Louderback v. McDonald's Restaurant*, Scioto App. No. 04CA2981, 2005-Ohio-3926, ¶19. "Under certain circumstances, however, disputed facts may exist regarding the openness and obviousness of a danger, thus rendering it a question of fact." Id. This court has recognized that "[w]here only one conclusion can be drawn from the established facts, the issue of whether a risk was open and obvious may be decided by the court as a matter of law. However, where reasonable minds could differ with respect to whether a danger is open and obvious, the obviousness of the risk is an issue

for the jury to determine." *Klauss v. Marc Glassman, Inc.*, Cuyahoga App. No. 84799, 2005-Ohio-1306, ¶17-20.

{¶ 23} Similar to the issue of governmental immunity, whether any ice accumulation was open and obvious cannot be answered as a matter of law at this time. Rocky River argues the orange barrel blocking the right-hand lane on Lake Road as well as the "keep left" sign informed drivers to proceed with caution and provided notice of a danger in that lane. This may be the case, but appellants' affidavits and deposition testimony dispute the presence of any sign, and no party stated where any ice in the road was located in relation to the barrel. There remains a material question of fact regarding the distance of any ice from the barrel and a warning sign placed along the road and its proximity to the alleged cause of the accident. These devices may provide sufficient warning,[4] but that determination is premature at this stage.

Conclusion

{¶ 24} Certain material issues of fact remain unanswered at this point in the litigation. It is unclear from the record how far away from the orange barrel the alleged ice had accumulated. The orange barrel may constitute sufficient notice to motorists to proceed with caution, but if the ice was

[4]See *Lindquist v. Dairy Mart/Convenience Stores of Ohio, Inc.* (Nov. 14, 1997), Ashtabula App. No. 97-A-0015, 4-5.

distant from the barrel, it would not. Rocky River also claims there was a sign placed along Lake Road instructing motorists to merge into the left-hand lane. No evidence of the distance from the alleged sign to the spot of the ice was submitted to the trial court. Further, appellants dispute that such a sign was present the day of the accident. Questions of material fact remain as to the existence and location of any signs and the distance of the alleged ice from the orange barrel. Rocky River may have taken all the necessary precautions to avoid liability, but it is unclear from this record whether that is the case.

{¶ 25} Appellants' assignments of error are sustained.

{¶ 26} This cause is reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellants recover of Rocky River costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas 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.

FRANK D. CELEBREZZE, JR., JUDGE

MARY EILEEN KILBANE, P.J., and

JAMES J. SWEENEY, J., CONCUR