[Cite as *Watson v. Lamb*, 2010-Ohio-5006.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 93902 and 93946

JAMES WATSON

PLAINTIFF

vs.

DEBORAH LAMB, ET AL.

DEFENDANTS

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-684074

BEFORE: Gallagher, A.J., McMonagle, J., and Cooney, J.

RELEASED AND JOURNALIZED: October 14, 2010

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SEAN C. GALLAGHER, A.J.:

{¶ 1} This journal entry and opinion consolidates Appeal Nos. 93902 and 93946, both of which challenge the granting of summary judgment in favor of defendant-appellee KeyBank N.A. ("KeyBank") against

plaintiff-appellant James Watson ("Watson") and defendant-appellant Deborah Lamb ("Lamb") in Cuyahoga County Common Pleas Court Case No. CV-684074.[1]

{¶ 2} A KeyBank branch ("KeyBank") is located at 1435 Warren Road in Lakewood, Ohio.[2] The front of the KeyBank building directly abuts the public sidewalk adjacent to Warren Road. The driveway, which permits patrons to exit the bank's drive-through ATM, runs along the north side of the building, crosses over the sidewalk, and intersects with Warren Road. A driver exiting via this driveway has limited visibility of pedestrian traffic on the sidewalk because of the location of the building. Therefore, KeyBank erected a stop sign with an attached parabolic mirror where the driveway intersects the sidewalk.[3] The mirror permits drivers to view pedestrian traffic on the sidewalk south of and beyond the driveway for a distance of approximately four to five feet.

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[1] Lamb filed a cross-claim against KeyBank in the underlying case. Watson and Lamb filed separate appeals in this court.

[2] The building was constructed in 1935 as a federal post office; KeyBank's renovation plans converting the building from a post office to a bank were approved by the city of Lakewood in 1992.

[3] There was deposition testimony from KeyBank property manager Garland Hairston that caution signs were posted on two sides of the building, one warning pedestrians and bicyclists of vehicles exiting the drive-through, and the other warning drivers of pedestrian traffic; however, there was also testimony from Watson and Lamb that those signs were not in place at the time of the accident.

{¶ 3} On January 26, 2008, Watson was riding his bicycle north on the sidewalk in front of KeyBank. It was early afternoon, and he chose to ride on the sidewalk because the road conditions were wet and icy. Watson's deposition testimony was that he was traveling at a speed of approximately 10 to 15 miles per hour.

{¶ 4} On that day, Lamb had used the KeyBank drive-through ATM and had proceeded on the driveway to the Warren Road exit. Lamb stated that she stopped at the stop sign and checked the mirror, which did not reflect any persons. She then proceeded to inch her vehicle toward the street, as she crossed over the sidewalk. At the time Watson saw Lamb's vehicle cross the sidewalk, he stated he was more than six feet from the driveway. Watson collided with the driver's side of Lamb's vehicle above the front wheel well. The severity of Watson's injuries required significant medical treatment.

{¶ 5} On February 5, 2009, Watson filed a complaint against Lamb and KeyBank,[4] alleging negligence. On February 26, 2009, Lamb filed her answer and cross-claim against KeyBank, alleging that it was the bank's negligence that was the active and primary cause of Watson's injuries. After discovery was conducted and the parties' depositions were complete, KeyBank

[4] Watson named other John Doe defendants, but he later dismissed these parties from the lawsuit.

filed a motion for summary judgment. Both Watson and Lamb submitted briefs in opposition. On September 8, 2009, the trial court granted summary judgment in favor of KeyBank.[5] Watson then filed a Civ.R. 41(A) notice of voluntary dismissal as to Lamb.

{¶ 6} Watson and Lamb filed separate appeals, which this court now consolidates. Both appellants argue that the trial court erred in granting summary judgment in favor of KeyBank.[6]

{¶ 7} Appellate review of summary judgment is de novo, governed by the standard set forth in Civ.R. 56. *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, ¶ 8. Accordingly, we afford no deference to the trial court's decision and independently review the record to determine whether summary judgment is appropriate. *Hollins v. Shaffer*, 182 Ohio App.3d 282, 2009-Ohio-2136, 912 N.E.2d 637, ¶ 12. Under Civ.R. 56(C), summary judgment is proper when the moving party

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[5] On August 31, 2009, the trial court granted summary judgment prior to having reviewed Watson's brief in opposition. Once this fact was brought to the court's attention, the original order was vacated, and the court issued the September 8, 2009 order.

[6] Watson's sole assignment of error states: "The trial court committed reversible error by granting KeyBank's motion for summary judgment where a genuine issue of material fact existed that KeyBank was negligent in the creation or maintenance of its property, and that KeyBank's negligence directly and proximately caused Watson's injuries."

Lamb's sole assignment of error states: "The trial court erred when, despite the existence of a genuine issue of material fact, it granted defendant-appellee KeyBank's motion for summary judgment as to plaintiff's claims and defendant-appellant's cross-claims."

establishes that "(1) no genuine issue of any material fact remains, (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 construing the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made." *State ex rel. Duncan v. Mentor City Council*, 105 Ohio St.3d 372, 2005-Ohio-2163, 826 N.E.2d 832, ¶ 9, citing *Temple v. Wean United, Inc*. (1977), 50 Ohio St.2d 317, 364 N.E.2d 267.

{¶ 8} In order to survive a properly supported motion for summary judgment in a negligence action, a plaintiff must establish that genuine issues of material fact remain as to whether (1) the defendant owed her a duty of care; (2) the defendant breached the duty of care; and (3) as a direct and proximate result of the defendant's breach, the plaintiff suffered injury. See *Texler v. D.O. Summers Cleaners* (1998), 81 Ohio St.3d 677, 693 N.E.2d 271; *Jeffers v. Olexo* (1989), 43 Ohio St.3d 140, 539 N.E.2d 614; *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St.3d 75, 472 N.E.2d 707.

{¶ 9} "Negligence is the failure to exercise that degree of care which an ordinarily careful and prudent person would exercise under the same or similar circumstances." *Gedeon v. East Ohio Gas Co.* (1934), 128 Ohio St. 335, 190 N.E. 924. "[B]efore failure to use such care can be made the basis for recovery it must appear that the plaintiff falls within the class of persons

to whom a duty of care was owing." Id. Whether a duty of due care is owed to a particular plaintiff depends upon whether the defendant should have foreseen that his conduct would likely cause a person in the plaintiff's position harm. *Texler*, supra.

{¶ 10} Section 315 of the Restatement of the Law, Torts 2d, states as follows: "There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives to the other a right to protection." Section 314 states the following: "The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action."

{¶ 11} In *Gelbman v. Second Natl. Bank of Warren* (1984), 9 Ohio St.3d 77, 458 N.E.2d 1262, the Ohio Supreme Court addressed the question of whether to extend a "duty to control third parties to a property owner for the acts of unrelated individuals, such as business invitees, who have left the owner's premises, have negligently entered a public thoroughfare outside the purview of the owner's control, and thereby negligently injure a third party."[7]

[7] The facts in *Gelbman* are similar to the ones before us in that a Burger King customer, upon exiting the establishment's driveway, entered the roadway and struck another vehicle. The injured motorist filed suit against Burger King, alleging negligence

Acknowledging that "it is well-established that liability in negligence will not lie in the absence of a special duty owed by the defendant," the *Gelbman* court declined "to impose an affirmative duty on a property owner to protect third parties from the negligent acts of business invitees which occur outside the owner's property and are beyond the owner's control." Id.

{¶ 12} In the case at bar, both parties cite *Stibley v. Zimmerman* (Aug. 26, 1998), Athens App. No. 97 CA 51, in which a McDonald's customer making a right turn out of the parking lot hit a pedestrian on the sidewalk. The driver claimed McDonald's landscaping blocked her view from the left, thereby diverting her attention. The *Stibley* court distinguished *Gelbman* by noting that in *Gelbman*, the defendant did not create the condition that caused the plaintiff's injury, whereas in *Stibley*, the appellee allegedly created the condition that ultimately caused appellant's harm. Id. The *Stibley* court also noted that the accident in *Gelbman* occurred in the public thoroughfare as opposed to on the sidewalk adjacent to the business owner's property. Id.

{¶ 13} The *Stibley* court stated: "[W]e believe a business owner has a duty to maintain a reasonably safe ingress and egress that serves to protect not only its patrons from harm, but that also serves to protect pedestrians

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for Burger King's failure to make its egress safe when it knew of the potential dangers surrounding the intersection of the driveway and the roadway.

and motorists crossing in front of the premises from harm. The business establishment may breach its duty to provide a reasonably safe ingress and egress for its patrons by, for example, placing signs or other obstructions that block a patron's view of pedestrian and vehicular traffic when entering or exiting the premises." Id.

{¶ 14} Nonetheless, the *Stibley* court affirmed summary judgment in favor of McDonald's, holding that it did not breach its duty to provide a reasonably safe ingress and egress for the benefit of its patrons, where the evidence showed that the establishment did not place any obstructions that blocked the patron's view of pedestrian or vehicular traffic. Id.

{¶ 15} Even if we impose such duty as was done by the *Stibley* court, we find KeyBank did not create the obstruction nor did it breach its duty to provide a reasonably safe egress for the benefit of its patrons. Instead, KeyBank took necessary safety measures by placing a stop sign and mirror where the driveway exit and sidewalk intersect in order to make the egress reasonably safe.

{¶ 16} We have considered the report submitted by Watson's expert, Gerald Burko, suggesting that KeyBank widen its driveway, move the stop sign and mirror, or replace the mirror with one that has a more extensive field of vision. We also note that Lakewood Ordinance 373.10 permits bicycle riding on the sidewalk, but that cyclists must reduce their speed significantly

when vehicles are present in driveways and crosswalks,[8] as was undoubtedly the case here. Lamb stated that she obeyed the stop sign and checked the mirror; Watson stated that he was traveling 10 to 15 miles an hour on the sidewalk, well in excess of the permitted speed limit in the presence of vehicular traffic; and Watson collided with Lamb's car once it had already entered the sidewalk. Had Watson been riding at the speed of an "ordinary walk," Lamb would either have seen him in the mirror or he would have seen her car as it crossed the driveway.

{¶ 17} Upon our review, we find Watson and Lamb have failed to put forth sufficient evidence to create a question of fact as to whether KeyBank breached an affirmative duty of care. The trial court did not err in granting summary judgment in favor of KeyBank. Watson's and Lamb's assignments of error are overruled.

Judgment affirmed.

It is ordered that appellee recover from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

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[8] Lakewood Ordinance 373.10(f) states the following: "No person shall operate a bicycle on a sidewalk at a speed greater than an ordinary walk when approaching or entering a crosswalk or approaching or crossing a driveway if a vehicle is approaching the crosswalk or driveway * * *."

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.

SEAN C. GALLAGHER, ADMINISTRATIVE JUDGE

CHRISTINE T. MCMONAGLE, J., and
COLLEEN CONWAY COONEY, J., CONCUR