[Cite as *Mason v. Guerard*, 2010-Ohio-1834.]

COURT OF APPEALS
HOLMES COUNTY, OHIO
FIFTH APPELLATE DISTRICT

THOMAS L. MASON, Administrator of the Estate of OF JAMES IVAN BRADY PARKER-GUERARD, Deceased

Plaintiff-Appellant

-vs-

LYNDA F. GUERARD

Defendant-Appellee

JUDGES:
Hon. Julie A. Edwards, P.J.
Hon. Sheila G. Farmer, J.
Hon. John W. Wise, J.

Case No. 09 CA 8

O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal from the Court of Common Pleas, Case No. 05 CV 95
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	April 23, 2010

APPEARANCES:

For Plaintiff-Appellant

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Wise, J.

{¶1} Appellant Thomas Mason, Administrator of the Estate of James Ivan Brady Parker-Guerard, Deceased, appeals the decision of the Holmes County Court of Common Pleas, which granted summary judgment in favor of Defendant-Appellee Lynda F. Guerard in a wrongful death suit. The relevant facts leading to this appeal are as follows.

{¶2} On August 28, 2003, appellee's four-year-old son, James Ivan Brady Parker-Guerard, was playing in the yard and parking area of his home on Township Road 213 in Holmes County. On that afternoon, appellee, who was not feeling well, was inside the residence, along with her husband, James Guerard. The child apparently started playing around and climbing on a Dodge minivan sitting in the driveway. The keys were not in the ignition, but tragically the child's head got stuck in a partially open vehicle window, causing fatal asphyxiation. A passing school bus driver saw the child's limp body on the outside of the minivan and alerted appellee and her husband.

{¶3} On August 29, 2005, Appellant Thomas Mason, as the appointed administrator of the estate of James Ivan Brady Parker-Guerard, filed a wrongful death action against appellee, alleging loss of support, services, society, prospective inheritance and the suffering of mental anguish by the child's father, Jonathon Parker, the child's two brothers, his sister, and other next of kin.

{¶4} Appellee filed an answer on October 25, 2005, denying the allegations of negligence on her part. On February 27, 2007, appellee filed a motion for summary judgment, to which appellant replied on March 21, 2007. The summary judgment motion and memorandum in support referenced the deposition transcripts of Lynda Guerard

and James Guerard, which at that time had not been filed and made a part of the trial court record.

{¶5} On March 29, 2007, the trial court granted summary judgment in favor of appellee and against the appellant on appellant's wrongful death complaint.

{¶6} Appellant thereupon appealed to this Court. We concluded in part that because the depositions of appellee and James Guerard were outside of the record, appellee's pleadings alone would not be "of sufficient evidentiary value to support the trial court's grant of summary judgment in favor of the appellee." See *Mason v. Guerard*, Holmes App.No. 07CA009, 2008-Ohio-4853, ¶21, (decided September 22, 2008). We thus reversed the grant of summary judgment. Id. at ¶23. A nunc pro tunc opinion was filed on October 20, 2008.

{¶7} Following our remand, appellee filed an amended and restated motion for summary judgment on May 19, 2009. Appellant filed a brief in opposition on June 12, 2009.

{¶8} On July 8, 2009, the trial court again granted summary judgment in favor of appellee.

{¶9} On July 24, 2009, appellant filed a notice of appeal. He herein raises the following sole Assignment of Error:

{¶10} "I. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY GRANTING SUMMARY JUDGMENT ON THE ISSUE OF WHETHER OR NOT THE APPELLEE WAS NEGLIGENT FOR FAILING TO ADEQUATELY SUPERVISE HER FOUR-YEAR-OLD SON, WHO DIED PLAYING ON A MOTOR VEHICLE WHILE THE APPELLEE, WHO KNEW OF HIS HABIT OF PLAYING ON CARS, WAS LYING ON A

COUCH IN THE HOME BY A WINDOW THROUGH WHICH SHE COULD HAVE OBSERVED HIM."

I.

{¶11} In his sole Assignment of Error, appellant contends the trial court erred in granting summary judgment in favor of appellee. We disagree.

Standard of Review

{¶12} Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 36, 506 N.E.2d 212. As such, we must refer to Civ.R. 56 which provides, in pertinent part:

{¶13} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. * * * A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor."

{¶14} Pursuant to the above rule, a trial court may not enter summary judgment if it appears a material fact is genuinely disputed. The party moving for summary judgment bears the initial burden of informing the trial court of the basis for its motion

and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. The moving party may not make a conclusory assertion that the non-moving party has no evidence to prove its case. The moving party must specifically point to some evidence which demonstrates the non-moving party cannot support its claim. If the moving party satisfies this requirement, the burden shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue of material fact for trial. *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 429, 674 N.E.2d 1164, citing *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 662 N.E.2d 264.

Analysis

{¶15} "Where the doctrine of *res ipsa loquitur* is not involved, negligence is never presumed from the mere fact of an accident and resulting injury, but specific acts or omissions indicating failure on the part of defendant to exercise due care must be alleged as the direct and proximate cause of the injury, and the burden is upon the plaintiff to prove the same." *Ungar v. Level Propane* (Jan. 15, 1997), Medina App.No. 2570-M, 1997 WL 33283, quoting *St. Marys Gas Co. v. Brodbeck* (1926), 114 Ohio St. 423, paragraph one of the syllabus. It is fundamental that the plaintiff in a negligence case must show (1) the existence of a duty, (2) a breach of the duty, and (3) an injury proximately resulting therefrom. *Scharver v. American Plastic Products LLC*, Stark App.No. 2009CA00087, 2010-Ohio-230, ¶ 12, citing *Menifee v. Ohio Welding Prod., Inc.* (1984), 15 Ohio St.3d 75, 77, 472 N.E.2d 707.

{¶16} We first turn to the issue of appellee's duty to supervise the child. The existence of a duty is a question of law. *Mussivand v. David* (1989), 45 Ohio St.3d 314, 318, 544 N.E.2d 265. Further, the existence of a duty depends on the foreseeability of

the injury. *Huston v. Konieczny* (1990), 52 Ohio St.3d 214, 217, 556 N.E.2d 505. An injury is foreseeable if a defendant knew or should have known that his or her act was likely to result in harm to someone. Id. Clearly, the amount of care required to discharge a duty to a child of tender years is greater than is necessary to discharge a duty to an adult exposed to the same danger. *Williams v. Cook* (1999), 132 Ohio App.3d 444, 455, citing *DiGildo v. Caponi* (1969), 18 Ohio St.2d 125. Nonetheless, "[p]arents of children of tender years must use care proportionate to known dangers, or dangers that might be known by the exercise of ordinary diligence and prudence; but parents are not bound to guard their children against unknown dangers, or dangers that ordinary diligence and prudence would not make it their duty to know." *City of St. Bernard v. Steingrube* (1922), 16 Ohio App.151, 152, quoting Beach on Contributory Negligence (3 ed.), Section 142.

{¶17} Appellant concedes in the case sub judice that "[t]he facts, at least with regard to what was occurring in the home while James [Ivan] Parker was losing his life outside, are essentially unknown ***." Appellant's Brief at 7. However, appellant maintains that the child had a habit of playing in and around vehicles. See Affidavit of Theresa Gallion, records custodian. Appellant also notes that the child frequently played outside. Mary Ogi, the bus driver for appellee's children, averred that she would see James Ivan playing outside about twice a week without any outside supervision. Ogi Affidavit at 2.

{¶18} Although appellee contradicted these assertions via her deposition, appellant urges that a dispute of material facts existed and summary judgment was thus improper. In support, appellant cites *Ziehm v. Vale* (1918), 98 Ohio St. 306, which

involved a defendant driving off with a four-year-old child hanging onto the vehicle while standing on its running board, despite the driver's earlier attempts to "shoo away" the child and his companions. Id. at 307. However, because *Ziehm* addresses a defendant who actually operated a motor vehicle resulting in harm to a child, we agree with appellee that the case is distinguishable from the matter sub judice. While an unsupervised child might easily encounter injury upon falling off of a stationary vehicle, we hold, under the tragic facts before us, that it is not reasonably foreseeable that an asphyxiation injury would occur to such child from the outside of a fixed, partially open car window.

{¶19} Moreover, even if a duty had been established in this instance, appellant did not overcome the deposition testimony of appellee and James Guerard that on the afternoon in question, appellee had essentially delegated supervision of the child to Mr. Guerard. Given that there are no claims in the complaint that Mr. Guerard was incompetent or otherwise lacked the ability to supervise a child, and that there are no claims appellee was aware of such incompetence or inability or that she negligently entrusted care of James Ivan in this instance, reasonable minds would not find the existence of a failure by appellee to act with ordinary care.

{¶20} Upon review, we hold summary judgment was properly granted in favor of appellee.

{¶21} Accordingly, appellant's sole Assignment of Error is overruled.

{¶22} For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Holmes County, Ohio, is affirmed.

By: Wise, J.

Edwards, P. J., and

Farmer, J., concur.

/S/ JOHN W. WISE_____

/S/ JULIE A. EDWARDS_____

/S/ SHEILA G. FARMER_____

JUDGES

JWW/d 0323

IN THE COURT OF APPEALS FOR HOLMES COUNTY, OHIO
FIFTH APPELLATE DISTRICT

THOMAS L. MASON, Administrator of The Estate of JAMES IVAN BRADY PARKER-GUERARD, Deceased	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
LYNDA F. GUERARD	:	
Defendant-Appellee	:	Case No. 09 CA 8

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Holmes County, Ohio, is affirmed.

Costs assessed to appellant.

/S/ JOHN W. WISE_____

/S/ JULIE A. EDWARDS_____

/S/ SHEILA G. FARMER_____

JUDGES