

[Cite as *Deringer v. Clinton Twp. Bd. of Trustees*, 2002-Ohio-1640.]

STATE OF OHIO)
)ss: IN THE COURT OF APPEALS
COUNTY OF WAYNE) NINTH JUDICIAL DISTRICT

CHESTER D. DERINGER

Appellant

v.

BOARD OF TRUSTEES OF CLINTON TOWNSHIP, WAYNE COUNTY, OHIO, et al.

Appellees

C.A. No. 01CA0043

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF WAYNE, OHIO
CASE No. 00 CV 0172

DECISION AND JOURNAL ENTRY

Dated: April 10, 2002

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

WHITMORE, Judge.

{¶1} Plaintiff-Appellant Chester D. Deringer has appealed from a judgment of the Wayne County Court of Common Pleas that granted summary judgment in favor of Defendant-Appellee Board of Trustees of Clinton Township, Wayne County, Ohio. This Court affirms.

I

{¶2} At approximately 3:00 a.m. on September 24, 1999, Appellant was driving a 1997 Suzuki motorcycle eastbound on Clinton Township’s Brown Road when he lost control of his motorcycle and crashed. Brown Road is a chip and seal road with a small bridge followed by a hill and an S-shaped curve. Appellant had never traveled the road before the accident, but he was aware that it was a back country road. Appellant testified that he could not see over the hill in the road and that he did not know what caused him to crash.

{¶3} Appellant sued the Board of Trustees of Clinton Township (“Appellee”) for personal injuries under a negligence theory. Appellant has asserted that Appellee is negligent by failing to maintain the road and creating a nuisance because the night of the accident a non-mandatory¹ S-curve sign was missing from Brown Road. The Ohio Department of Human Resources was joined in the suit by Appellant and brought a cross-complaint against Appellee to gain subrogation rights for Appellant’s medical bills. Appellee filed a summary judgment motion and the trial court granted the motion on August 14, 2001. Appellant has appealed that judgment, asserting four assignments of error. For ease of discussion, the assignments of error have been rearranged.

II

{¶4} Pursuant to Civ.R. 56(C), summary judgment is proper if:

- (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

¹ The S-curve sign on Brown Road is not required by the Ohio Manual of Uniform Traffic Control.

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.

{¶5} Appellate review of a lower court's entry of summary judgment is *de novo*, applying the same standard used by the trial court. *McKay v. Cutlip* (1992), 80 Ohio App.3d 487, 491. The party seeking summary judgment initially bears the burden of informing the trial court of the basis for the motion and identifying portions of the record demonstrating an absence of genuine issues of material fact as to the essential elements of the nonmoving party's claims. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. The movant must point to some evidence in the record of the type listed in Civ.R. 56(C) in support of his motion. *Id.* Once this burden is satisfied, the nonmoving party has the burden, as set forth in Civ.R. 56(E), to offer specific facts showing a genuine issue for trial. *Id.* The nonmoving party may not rest upon the mere allegations and denials in the pleadings but instead must point to or submit some evidentiary material that shows a genuine dispute over the material facts exists. *Henkle v. Henkle* (1991), 75 Ohio App.3d 732, 735.

Assignment of Error Number Two

{¶6} The trial court erred as a matter of law by finding that the missing S-curve sign was not a proximate cause of [Appellant's] accident and injuries for the reason that there were factual questions for a jury to determine and such precluded summary judgment.

{¶7} In his second assignment of error, Appellant has asserted that the trial court erred in granting summary judgment in favor of Appellee because genuine issues of fact existed regarding whether the missing S-curve sign was the proximate cause of

Appellant's accident. Appellant has contended that the issue of proximate cause should have been submitted to a jury. However:

{¶8} [J]ust because a particular element of a claim or defense involves a question of fact does not automatically preclude the claim or defense from a determination under summary judgment. The inquiry under summary judgment is whether the moving party has demonstrated the absence of a genuine issue of material fact and, if so, whether the nonmoving party has responded with evidence demonstrating the existence of a genuine issue of material fact.

{¶9} *Wagner v. Heavlin* (2000), 136 Ohio App.3d 719, 730. Therefore, this Court must determine if Appellee established the absence of a genuine issue of material fact and, if so, whether Appellant has responded with evidence that such an issue does exist.

{¶10} In order to establish a negligence claim against Appellee, Appellant must show 1) the existence of a duty, 2) a breach of the duty, and 3) an injury proximately caused by the breach. *Meniffee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St.3d 75, 77. Appellee's negligence must have been both the direct and proximate cause of the accident. *Birkhimer v. Sports-N-Stuff, Inc.* (Oct. 31, 2001), Lorain App. No. 01CA007849, unreported, at 6-7. Assuming without deciding that the first two negligence elements have been established, this Court must determine whether Appellee established the absence of any material fact regarding proximate cause.

{¶11} Appellee met its *Dresher* burden by demonstrating through Appellant's testimony that Appellant failed to identify what caused the accident. See *Birkhimer* at 7 (holding that summary judgment was appropriate where the appellant did not know what caused his injury and failed to establish a genuine issue of fact as to the appellee's negligence). Appellant admitted that he had no idea what caused him to crash or at what

point in the road his motorcycle left the roadway. Appellee also established that no other accidents had occurred on the portion of Brown Road where Appellant had his accident. It then became incumbent upon Appellant to demonstrate a genuine issue of material fact as to whether Appellee's negligence was both the direct and proximate cause of the accident. Appellant provided no evidence that the missing S-curve sign caused the accident or that it was even a factor in the accident. In fact, Appellant consistently admitted he did not know what caused the accident.

{¶12} Construing the evidence most strongly in favor of Appellant, this Court cannot conclude that a reasonable jury could find that the missing S-curve sign caused Appellant's accident. Appellant admitted he had never driven the road before, that he could not see over the hill, and that he did not know what caused the accident. There is no genuine issue of material fact regarding causation, and Appellee was entitled to judgment as a matter of law. Therefore, the trial court properly granted summary judgment in favor of Appellee. Accordingly, Appellant's second assignment of error is overruled.

Assignment of Error Number One

{¶13} The trial court erred as a matter of law by finding that missing [sic] S-curve sign did not constitute a nuisance to [Appellant] for the reason that there were questions of fact in dispute for a jury's determination on this issue; and such precluded summary judgment.

Assignment of Error Number Three

{¶14} The trial court erred as a matter of law by granting summary judgment to [Appellee] on the issue of whether [Appellee] had actual or constructive notice that S-curve warning sign [sic] was missing because there were questions of fact as to its notice, both actual and constructive, upon which reasonable minds can differ, so the issue was for a jury's determination.

Assignment of Error Number Four

{¶15} The trial court erred as a matter of law by granting summary judgment to [Appellee] by finding that the sole cause of the accident was the conduct of the [Appellant] where reasonable minds could differ on issue [sic] of causation precluding summary judgment.

{¶16} Appellant's first, third, and fourth assignments of error are rendered moot by our resolution of Appellant's second assignment of error. App.R. 12(A)(1)(c).

II

{¶17} Appellant's second assignment of error is overruled and Appellant's first, third, and fourth assignments of error are moot. The judgment of the trial court is affirmed.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Wayne, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

Exceptions.

BETH WHITMORE
FOR THE COURT

SLABY, P. J.
CONCURS

CARR, J.
DISSENTS SAYING:

I must respectfully dissent as I conclude that Appellant demonstrated a genuine issue of material fact as to the cause of the accident. The record reflects that Brown Road where the accident occurred was a narrow, chip and seal country road that runs in an east-west direction. Brown Road has an area where the road forms an S-curve. Prior to the S-curve there is a hill. Appellee had previously erected an S-curve warning sign there but it was missing the night in question. There was no warning of the configuration of the road.

Appellant testified that on the night of the accident, he was traveling east on Brown Road. Appellant had never been on Brown Road before and did not know the configuration of the road. Appellant was traveling no faster than the speed limit of 55 m.p.h. Appellant testified that as he came up over the hill he could not see very far ahead of him as the hill blocked visibility where Brown Rd. forms a S-curve. Appellant also indicated that it was dark as it was in the early morning hours and there were no street lights. Appellant was unable to negotiate the left curve. He lost control and left the roadway.

According to the Ohio Manual of Uniform Traffic Control Devices for Streets and Highways (attached to Appellee's motion for summary judgment and Appellant's brief in opposition to summary judgment), section 2B-4 "Classification of Signs", signs are separately classified as regulatory signs, guide signs, or warning signs. Both parties agreed that the S-sign is a warning sign. The function of a warning sign is to "call attention to conditions in or adjacent to highway or street that are actually or potentially hazardous to traffic operations." *Id.*

The fact that Appellant testified he did not know what caused him to leave the traveled portion of the highway is relatively meaningless. The cause of the accident may be inferred from all the circumstances set forth in the record. See, e.g., *Miller v. Adamson dba Adamson's Buford Grocery Store* (Sep. 16, 1996), Brown App. No. CA96-02-0007, unreported ("This is not a case where the plaintiff has no idea, beyond pure speculation, how her accident happened."). The record reveals that there was a left curve at the top of a hill on a dark, narrow country road. There was no warning of this approaching S-curve because the warning sign was removed. Appellant's motorcycle left the road precisely where the S-curve was located. A genuine issue of material fact exists as to whether the lack of warning to Appellant of the approaching S-curve was the proximate cause of the accident. Accordingly, I dissent.

APPEARANCES:

CHARLES A. KENNEDY, Attorney at Law, 558 North Market St., Wooster, Ohio 44691, for Appellant.

JACK R. BAKER and DANIEL E. CLEVENGER, II, Attorneys at Law, 400 South Main St., North Canton, Ohio 44720, for Appellees.