[Cite as *Vanalkemade v. Hitsman*, 2009-Ohio-3197.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WILLIAMS COUNTY

Rob D. Vanalkemade, et al.

Plaintiffs

v.

Robert Karl Hitsman, et al.

Appellants

v.

Kerry John Nelson, et al.

Appellees

Court of Appeals No. WM-08-019

Trial Court No. 07 CI 010

DECISION AND JUDGMENT

Decided: June 30, 2009

* * * * *

Joseph J. Golian and Mark Iannotta for appellants Robert K. Hitsman and Transport Corporation of America.

Andrew J. Ayers and Robert J. Bahret for appellees Kerry John Nelson and Aaron Winett.

* * * * *

SINGER, J.

{¶ 1} Appellants appeal a summary judgment issued by the Williams County Court of Common Pleas in favor of third party defendants impleaded for damages contribution in a personal injury suit. For the reasons that follow, we affirm.

{¶ 2} On the evening of December 6, 2005, a group of performers affiliated with the Reverend Billy and the Church of Stop Shopping road show were on the Ohio Turnpike en route to Chicago. When the troop reached Williams County, one of the two vehicles in which they were traveling began to overheat. The drivers pulled into a plaza where they were informed that service was available at the next exit.

{¶ 3} The vehicles moved back onto the Turnpike, traveling at a reduced speed so that the lead vehicle would not overheat. At the 18.5 mile marker, the following vehicle, a 1965 GMC motor coach, was struck in the rear by a semi tractor-trailer operated by appellant Robert K. Hitsman and owned by appellant Transport Corporation of America. Several passengers in the motor coach, including Rob Vanalkemade and Jerald C. Goralnick, were injured.

{¶ 4} On January 10, 2007, Vanalkemade and Goralnick sued appellants to recover for their injuries. On March 28, 2008, appellants impleaded appellees, Aaron W. Winett, the driver of the motor coach that was rear ended, and appellee Kerry John Nelson,[1] the owner of the motor coach. Appellants alleged that they were entitled to contribution from appellee Nelson because he was responsible for any damages by virtue of his failure to properly maintain his vehicle and for negligent entrustment in permitting appellee Winett to drive the vehicle. Appellee Winett was liable because he was driving too slowly and did not hold a valid Commercial Driver's License ("CDL").

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[1]A subrogation claimed by Progressive Insurance to recover for damages to Nelson's motor coach was initiated in the Bryan Municipal Court and eventually consolidated into this matter. That matter was appealed separately in case number WM-08-025.

{¶ 5} On August 7, 2008, appellees Nelson and Winett moved for summary judgment, arguing that the sole cause of the accident was appellant Hitsman's failure to maintain assured clear distance. In support, appellees submitted appellant Hitsman's statement to the Ohio Highway Patrol in which he reported that he was westbound on the Turnpike at 64 m.p.h. when he saw the vehicle immediately in front of him move suddenly to the left lane. Once that vehicle moved, he saw the motor coach's tail lights "about three truck lengths" ahead. Perceiving traffic in the left lane, the driver stated that he could not change lanes so he applied his brakes, "* * * but had [a] heavy load and couldn't stop in time." Asked if he could tell how fast the motor coach was going, appellant Hitsman advised the trooper that he could not, but it was moving more slowly than the other vehicles: "if it was going 45 mph I'd be amazed."

{¶ 6} Appellee Winett told the patrol that he was going about 40 m.p.h. with his hazard lights flashing. Appellant Hitsman said he saw the motor coach's tail lights but did not notice whether brake lights or hazard lights were on.

{¶ 7} Appellees Nelson and Winett argued that appellant Hitsman's violation of R.C. 4511.21(A), the assured clear distance statute, constituted negligence per se, making Hitsman's negligence the sole proximate cause of the collision.

{¶ 8} Appellants responded with a memorandum in opposition, supported by an affidavit from an accident reconstructionist who reviewed photos and police reports. The reconstructionist opined that the motor coach was "* * * likely traveling between 30 to 40 mph at the time of impact * * *." Appellees argued (1) that Hitsman did not violate R.C.

4511.12 because, even though he saw the motor coach's tail lights, he could not "reasonably discern" it's distance or speed, (2) he should be absolved of responsibility for the collision because of a "sudden emergency," and (3) there is a question of fact as to liability because a motor coach carrying 15 passengers qualifies as a "commercial motor vehicle" under federal regulations and requires a driver to have a CDL, which appellee Winett did not have.

{¶ 9} Appellees responded, retorting that (1) Hitsman's admission that he saw the moving motor coach satisfied any requirement to "reasonably discern" the hazard, (2) any "emergency" was of Hitsman's own making, and (3) driver Winett's lack of a CDL in no way contributed to his being rear-ended. Appellees also moved to strike portions of the accident reconstructionist's affidavit, arguing that those portions did not comply with Civ.R. 56 (E).

{¶ 10} On consideration, the trial court struck portions of the accident reconstructionist's affidavit, rejected appellants' argument that the motor coach was not discernible, concluded that there was no "sudden emergency," and ruled that appellee Winett's lack of a CDL in no manner contributed to the collision. On these conclusions, the court granted appellees' motion for summary judgment and found no just cause for delay of appeal.

{¶ 11} From this judgment, appellants now bring this appeal. Appellants set forth the following single assignment of error:

{¶ 12} "I. The trial court erroneously granted appellees' motion for summary judgment thereby precluding appellants' ability to raise the issues of proximate cause and comparative fault to a jury."

{¶ 13} "The principal purpose of [summary judgment] is to enable movement beyond allegations in pleadings and to analyze the evidence so as to ascertain whether an actual need for a trial exists. Because it is a procedural device to terminate litigation, summary judgment must be awarded with caution." *Ormet Primary Aluminum Corp. v. Employers Insurance of Wausau*, 88 Ohio St. 3d 292, 299, 2000-Ohio-330. (Citations omitted.) Appellate review of an award of summary judgment is de novo, employing the same standard as the trial court. *Lorain Natl. Bank v. Saratoga Apts.* (1989), 61 Ohio App.3d 127, 129. The motion may be granted only when it is demonstrated:

{¶ 14} "* * * (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) 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, who is entitled to have the evidence construed most strongly in his favor." *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 67, Civ.R. 56(C).

{¶ 15} When seeking summary judgment, a party must specifically delineate the basis upon which the motion is brought, *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, syllabus, and identify those portions of the record that demonstrate the absence of a genuine issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. When a

properly supported motion for summary judgment is made, an adverse party may not rest on mere allegations or denials in the pleading, but must respond with specific facts showing that there is a genuine issue of material fact. Civ.R. 56(E); *Riley v. Montgomery* (1984), 11 Ohio St.3d 75, 79. A "material" fact is one which would affect the outcome of the suit under the applicable substantive law. *Russell v. Interim Personnel, Inc.* (1999), 135 Ohio App.3d 301, 304; *Needham v. Provident Bank* (1996), 110 Ohio App.3d 817, 826, citing *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 248.

{¶ 16} Citing *Hichens v. Hahn* (1985), 17 Ohio St.3d 212, 214, appellants insist that negligence per se is not equivalent to liability per se. A presumption of negligence derived from the violation of a law or rule does not necessarily establish that such negligence proximately caused the injury of which the plaintiff complains. Where there is a question as to whose acts or omissions caused injury, the determination is better reserved for the jury.

{¶ 17} In this matter, appellants argue, the trial court confused negligence with liability and denied them the opportunity to allow a jury to apportion the degree of negligence of each party in determining liability to the injured.

{¶ 18} Appellees respond that appellants failed to present any evidence that anyone other than Hitsman was comparatively negligent or proximately caused any of the injuries of which Vanalkemade and Goralnick complain. Absent such evidence before the court, appellees maintain, no material question of fact remained and they were entitled to judgment as a matter of law.

{¶ 19} Appellants are of course correct that negligence and liability are not equivalent. Some of the most disputed proceedings in law take place after negligence is established. Nevertheless, in this matter, Hitsman's negligence was established and it was appellants who sought to show that someone else acted in a manner that would mitigate appellants' liability. The burden, then, was on appellants to come forth with evidence to show that appellees in some way were preemptively or comparatively liable.

{¶ 20} The only evidence submitted was accident investigation reports, including statements from each of the drivers, and the unstricken portions of the reconstructionist's affidavit. The reconstructionist's estimate of the speed of the motor coach was stricken and appellants do not assign error to this ruling.

{¶ 21} "[A] person violates the assured clear distance ahead statute if 'there is evidence that the driver collided with an object which (1) was ahead of him in his path of travel, (2) was stationary or moving in the same direction as the driver, (3) did not suddenly appear in the driver's path, and (4) was reasonably discernible.'" *Pond v. Leslein*, 72 Ohio St.3d 50, 52,1995-Ohio-193, quoting *Blair v. Goff-Kirby Co.* (1976), 49 Ohio St.2d 5, 7.

{¶ 22} Appellants insist that "reasonably discernable" encompasses something more that being able to see something in the roadway. Citing *Sharp v. Norfolk and Western Ry. Co.* (1988), 36 Ohio St.3d 172, and *Junge v. Brothers* (1985), 16 Ohio St.3d 1, appellants argue that whenever there is a dispute as to whether an object is discernable, the question should go to the jury.

{¶ 23} There is no question of whether something is discernable merely because a party suggests the issue. In *Sharp* the issue reserved for the jury was whether a 16 year-old rider of a snowmobile could discern an unlighted railroad flat car left across a crossing by the defendant railroad. In *Junge* the question was whether at night a motorist could discern an overturned semi trailer with its lights off and its unreflective side blocking an interstate. Again the court concluded that this was a jury question.

{¶ 24} The only evidence of whether the motor coach struck in this case was discernable comes from the statement of appellant Hitsman to the highway patrol. He told troopers he saw the motor coach's tail lights when the vehicle in front of him moved aside. There is no indication in Hitsman's statement that he perceived the motor coach for anything other than what it was: a slow moving vehicle with which he was about to collide. Thus, the motor coach was "reasonably discernable."

{¶ 25} With respect to appellants' assertion that Hitsman should be relieved of his duty to maintain an assured clear distance because the appearance of the motor coach constituted a sudden emergency:

{¶ 26} "In order to invoke the sudden emergency doctrine [a party must] show: (1) compliance with a specific safety statute was rendered impossible, (2) by a sudden emergency, (3) that arose without the fault of the party asserting the excuse, (4) because of circumstances over which the party asserting the excuse had no control, and (5) the party asserting the excuse exercised such care as a reasonably prudent person would have

under the circumstances." *Steffy v. Blevins,* 10th Dist. No. 02AP-1278, 2003-Ohio-6443, ¶ 27, citing *Bush v. Harvey Transfer Co.* (1946), 146 Ohio St. 657, 664-665.

{¶ 27} Hitsman's own statement to the Highway Patrol was that he was driving 64 m.p.h. when the vehicle in front of him moved into the left lane, revealing to Hitsman that he was just three truck lengths from the motor coach. The coach did not suddenly enter its path; it was always in his lane, unseen only because of the vehicle he was following. That he was following so closely to the vehicle before him that he was unable to respond to the unexpected appearance of something he should have expected is solely his fault. Consequently, no sudden emergency arose in this matter.

{¶ 28} Concerning appellee Winett's lack of a CDL, as appellants have already pointed out to us, negligence per se is not equivalent to liability per se. Appellants have put forth no evidence that appellee Winett by act or omission in any way contributed to the plaintiffs' injuries. Thus, as the trial court concluded, the type of operator's license Winett possessed is immaterial to the cause of the collision or damages.

{¶ 29} Appellants also allude to an argument that the modification of the interior of the motor coach may have contributed to its occupant's injuries. This is an argument appellants did not raise in the trial court until a Civ.R. 60(B) motion after summary judgment had been rendered. The argument is not only beyond the scope of appeal, it is unsupported by any evidence.

{¶ 30} Consequently, appellants' sole assignment of error is not well-taken. The trial court properly concluded that that there were no genuine issues of material fact and appellees were entitled to judgment as a matter of law. Appellee's motion to file supplemental brief is found not well-taken and is denied.

{¶ 31} On consideration whereof, the judgment of the Williams County Court of Common Pleas is affirmed. Appellants are ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

John R. Willamowski, J. _____
CONCUR.
JUDGE

Judge John R. Willamowski, Third District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.