

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

Samuel Mallette, Jr., et al.

Court of Appeals No. L-08-1410

Appellants

Trial Court No. CI0200701546

v.

Penske Truck Leasing Company,  
L.P., et al.

**DECISION AND JUDGMENT**

Appellees

Decided: June 30, 2009

\* \* \* \* \*

Kevin J. Boissoneault, Russell Gerney and Michael D. Bell,  
for appellants.

James J. Turek, Brian D. Sullivan and Brian Lee, for appellees.

\* \* \* \* \*

WILLAMOWSKI, J.

{¶ 1} Appellant, Samuel Mallette, Jr., appeals a grant of summary judgment rendered by the Lucas County Court of Common Pleas in a personal injury case. For the reasons herein, we reverse.

{¶ 2} M&M Foods Express, L.L.C. ("M&M") and Penske Truck Leasing Company ("Penske") entered into a lease agreement whereby Penske provided M&M with semitrailers for delivery services. This lease required Penske to, among other things, perform preventative maintenance on the trailers every 90 days and whenever problems were reported.

{¶ 3} Mallette was employed by M&M as a truck driver. He sustained injuries while climbing out of a semitrailer leased by Penske. To assist persons exiting a sliding door on the trailer's side, a single, retractable metal step was attached by arms to the trailer's underside. The step was attached by two welds which held the arms in place and secured the arms to the trailer. The welds prevented the arms from pulling back through the holes on the side of the trailer, thereby breaking loose. Because they are hidden behind the side of the trailer, the welds are not noticeable upon ordinary inspection.

{¶ 4} As Mallette climbed down, the right arm of the retractable step on the side of the trailer broke loose. The loss of balance caused him to reach for a door latch on the side of the trailer above the step. Thus, Mallette avoided falling to the ground but, instead, his shoulders were injured. The incident was reported to Penske, who then determined that the cause of the accident was a weld which had broken off from one of the step's arms.

{¶ 5} A Penske mechanic had repaired the step in 2002. During the repair process, the step's arm welds were cut off so that the step could be removed. After the repairs were made, the arms of the step were re-welded to secure the step back onto the trailer. Penske performed routine preventative maintenance on the trailer in February 2005, 11 days before

the accident. Mallette also inspected the trailer before beginning his deliveries the day of his accident and did not notice any problems. After Mallette's accident, Penske inspected and then re-welded the step's arm to the trailer.

{¶ 6} Mallette contended that Penske negligently caused his injury by improperly welding the step onto the trailer when it was repaired in 2005. Penske, in response, argued that a number of plausible alternatives could have caused the weld break: corrosion from weather, being hit by the tractor's wheel, or being struck by debris from the road.

{¶ 7} The trial court granted summary judgment for Penske, concluding that Mallette had not shown that Penske's welding caused the accident. The court found Mallette's argument speculative since Penske identified at least three different possible causes of the weld break. Because the court found other possible causes more probable than a negligent weld, it granted Penske's motion for summary judgment.

{¶ 8} Mallette asserts two assignments of error, which we treat jointly:

{¶ 9} I. "The trial court erred by granting summary judgment despite also finding that a genuine issue of material fact remained in dispute."

{¶ 10} II. "The trial court erred by granting summary judgment despite finding that reasonable minds could come to more than one conclusion and one of those conclusions is not adverse to the non-moving party."

{¶ 11} We review a grant of summary judgment de novo, applying the same standard used by the trial court. *Leizerman v. Kanous*, 6th Dist. No. L-08-1009, 2009-Ohio-1469, ¶ 9; *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. Summary judgment is

appropriate when "there is no genuine issue as to any material fact and \* \* \* the moving party is entitled to judgment as a matter of law." Civ.R. 56(C). When summary judgment is reviewed, the appellate court should look at the record in the light most favorable to the party opposing the motion. *Williams v. First United Church of Christ* (1974), 37 Ohio St.2d 150, 151.

{¶ 12} The purpose of summary judgment is to determine whether triable issues of fact exist. *Lakota Local School Dist. Bd. of Edn. v. Brickner* (1996), 108 Ohio App.3d 637, 643. Since summary judgment deprives a litigant of their day in court, it must be used with caution. *Leibreich v. A.J. Refrigeration* (1993), 67 Ohio St.3d 266, 269. Summary judgment must be granted only when reasonable minds can come to but one conclusion, after construing the evidence most strongly in favor of the nonmoving party. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66. If reasonable minds could differ on the issue of proximate cause, summary judgment is generally not appropriate. *Merchants Mut. Ins. Co. v. Baker* (1984), 15 Ohio St.3d 316, 318. "[I]ssues of proximate cause \* \* \* are ordinarily for the trier of fact to determine." *Leizerman v. Kanous*, 6th Dist. No. L-08-1009, 2009-Ohio-1469, ¶ 19.

{¶ 13} A negligence claim requires a showing that the plaintiff was owed a duty by the defendant, the defendant breached that duty, and the defendant's breach proximately caused the plaintiff's injury. *Baier v. Cleveland R. Co.* (1937), 132 Ohio St. 388, 391. At issue here is whether summary judgment is proper where the defendant's negligence and other alternative causes are equally plausible possibilities.

{¶ 14} The court may not make an independent judicial examination of conflicting factual issues in order to grant summary judgment. *Heatwall v. Boston Hts.* (1990), 68 Ohio App.3d 96, 98. Here, the trial judge found at least four possible conclusions which could be drawn as to what proximately caused the step's weld to break. While some possible causes may be more or less likely than others, if more than one possibility is reasonable, then reasonable minds could not have come to but one conclusion, and summary judgment is inappropriate. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66.

{¶ 15} Summary judgment also requires that the evidence be viewed most strongly in favor of the party against whom the motion for summary judgment is made. Civ.R. 56(C). Inferences from the facts available are to be made in favor of the nonmoving party. *Durham v. Major Magic's All Star Pizza Revue, Inc.*, 6th Dist. No. L-04-1192, 2005-Ohio-1029, ¶ 13. Doubts should also be resolved in favor of the nonmoving party. *Leibreich v. A.J. Refrigeration* (1993), 67 Ohio St.3d 266, 269.

{¶ 16} Here, the trial court improperly resolved a question of fact by determining that a possible strike to the step (such as by debris from the road) was a more likely cause than a negligent weld. The court weighed probabilities and sided with the moving party because the probability that Penske was not negligent seemed more likely. In doing so, the court resolved a doubt in favor of the moving party, contrary to Civ.R. 56(C).

{¶ 17} Additionally, the court ignored Mallette's contention that a defective or negligently-made weld was unnoticeable on inspection. By ignoring this contention, the court construed the evidence in a light more favorable to the moving party. Construing the

evidence most favorably for Mallette, a reasonable person could conclude that proximate causation remained open to a number of reasonable possibilities. Summary judgment cannot be granted when a material issue of fact is in dispute. Civ.R. 56(C).

{¶ 18} Penske contends that because Mallette did not provide competent evidence that the welds more likely than not failed as a result of Penske's negligence, summary judgment should stand. What matters is not whether the weld break was *more likely than not* to have been caused by something other than negligence. What matters is whether reasonable minds could reach but one conclusion.

{¶ 19} Mallette's assignments of error, therefore, are well-taken. The judgment of the Lucas County Court of Common Pleas is reversed, and this case is remanded for proceedings consistent with this decision. Appellees are ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT REVERSED.

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

Mallette v. Penske Truck  
Leasing Co., L.P.  
C.A. No. L-08-1410

Peter M. Handwork, J.

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JUDGE

Thomas J. Osowik, J.

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JUDGE

John R. Willamowski, J.  
CONCUR.

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JUDGE

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

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:  
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.