[Cite as *Nackowicz v. Weisman Ents. Holdings, Inc.*, 2011-Ohio-3635.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

EMILY NACKOWICZ,	:	
Plaintiff-Appellant,	:	CASE NO. CA2010-11-312
	:	O P I N I O N
- vs -	:	7/25/2011
WEISMAN ENTERPRISES HOLDINGS, INC.,	:	
Defendant-Appellee.	:	

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2009-02-0586

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POWELL, P.J.

{¶1} Plaintiff-appellant, Emily E. Nackowicz, appeals from the judgment of the Butler County Court of Common Pleas granting summary judgment in favor of defendant-appellee, Weisman Enterprises Holdings, Inc. For the reasons that follow, we affirm the decision of the trial court.

{¶2} On September 8, 2007, between the hours of 4:00 p.m. and 5:00 p.m.,

plaintiff and several companions were returning home from a sorority event in Oxford, Ohio. Although it was raining while the group walked home, the weather grew increasingly worse and quickly became windy, at which time plaintiff sought shelter beneath a marquee owned by defendant, located at Brick Street Bar. While standing beneath the marquee, a wind gust nearing 50-60 m.p.h. upended a nearby A-frame sandwich sign, which struck and injured plaintiff's leg. Physicians immediately treated plaintiff's wound, but approximately 12 days later, plaintiff was diagnosed with necrotizing fasciitis, an infection that resulted in nine surgeries and scarring to plaintiff's leg.

{¶3} As a result of the incident, plaintiff brought suit against defendant, alleging defendant was negligent in placing the sandwich sign in front of Brick Street Bar. On June 22, 2010, defendant filed a motion for summary judgment, arguing no genuine issue of material fact existed because sudden, excessive winds were the proximate cause of plaintiff's injury. Defendant argued the winds constituted an unforeseeable "Act of God," and thus, plaintiff's injury was not attributable to defendant.

{¶4} On October 28, 2010, the trial court granted defendant's motion for summary judgment. As the basis of its decision, the trial court agreed with defendant that the winds constituted an unforeseeable Act of God and were the proximate cause of plaintiff's injury.

{¶5} Plaintiff timely appeals, raising one assignment of error for review:

{¶6} "THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO SUPPRESSS [sic.]"

{¶7} While plaintiff's assignment of error refers to a motion to suppress, her substantive argument relates to summary judgment. Plaintiff argues defendant was not entitled to judgment because numerous issues of material fact remained regarding defendant's negligence. Plaintiff also argues the trial court failed to construe the facts in a light most favorable to her, as the nonmoving party.

{¶8} Summary judgment is proper when there is no genuine issue of material fact remaining for trial, the moving party is entitled to judgment as a matter of law, and reasonable minds can only come to a conclusion adverse to the nonmoving party, construing the evidence most strongly in that party's favor. Civ.R. 56(C); *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 1996-Ohio-107. The moving party bears the initial burden of informing the court of the basis for the motion and demonstrating the absence of a genuine issue of material fact. Id. Once this burden is met, the nonmoving party has a reciprocal burden to set forth specific facts showing a genuine issue for trial. Id.; Civ.R. 56(E).

{¶9} On appeal, a trial court's decision granting summary judgment is reviewed de novo, which means we review the judgment of the trial court independently and without deference to its determination. *Morris v. Dobbins Nursing Home*, Clermont App. No. CA2010-12-102, 2011-Ohio-3014, ¶14.

{¶10} In the case at bar, defendant asserts, as an affirmative defense, that it is not liable for plaintiff's injury because the injury resulted solely from an Act of God. In *Piqua v. Morris* (1918), 98 Ohio St. 42, the Ohio Supreme Court addressed the Act of God defense in the context of a negligence action and held:

{¶11} "The term 'act of God' [sic] in its legal significance, means any irresistible disaster, the result of natural causes, * * * which could not have been reasonably anticipated, guarded against or resisted." Id. at 48. An injury may be attributed to an Act of God where it is due directly and exclusively to an unforeseeable force of nature without human intervention. Id. However, if the evidence indicates that the negligence of the defendant combined with some natural force to produce the injury in question, the issue of proximate causation is one for the jury to consider and summary judgment may not properly be rendered. Id. See, also, *Bier v. New Philadelphia* (1984), 11 Ohio St.3d 134,

136.

{¶12} In order for the Act of God defense to bar a plaintiff's negligence claim at the summary judgment stage, there must be "no evidence in the record from which a reasonable mind could conclude that the defendant's negligence concurred in any way with the Act of God in proximately causing the plaintiff's injury or that defendants [sic] could have reasonably anticipated, guarded against and foreseen the Act of God which caused the injury," in this case a windstorm in Oxford, Ohio. *Sutliff v. Cleveland Clinic Found*., Cuyahoga App. No. 91337, 2009-Ohio-352, ¶20. Defendant argues the evidence is lacking in this matter. Specifically, defendant argues it could not have reasonably anticipated, guarded against or foreseen the sudden windstorm, and that the accident was due "directly and exclusively to such a natural cause without human intervention." *Piqua* at 48. Conversely, plaintiff argues defendant was negligent in handling the sandwich sign, which combined with the windstorm to cause the sandwich sign to fall onto her leg. Plaintiff argues such negligence offsets defendant's Act of God defense and subjects defendant to liability.

{¶13} In granting defendant's motion, the trial court found there was no evidence that defendant's performance, or nonperformance, of any act constituted negligence. Accordingly, the trial court accepted defendant's Act of God defense upon finding that "but for the heavy winds, the Plaintiff would not have been injured by a blown down sign."

{¶14} On appeal, plaintiff argues the trial court improperly decided several issues of fact regarding defendant's negligence, including: (1) whether the sandwich sign was properly placed and fully extended; (2) whether the sandwich sign had previously blown over; (3) whether the placement of the sandwich sign "and/or the lack of safety features" was the proximate cause of plaintiff's injury; and (4) whether the sidewalk was a public right-of-way or was instead part of defendant's business.

{¶15} In her first issue for review, plaintiff argues there is a genuine issue of material fact as to whether the sandwich sign was properly placed and fully extended on September 8, 2007. We find plaintiff presented no evidence to support this claim. In fact, plaintiff admits "[n]one of the witnesses deposed could recollect how the sign [was] placed" on the day of the incident. As such, plaintiff has failed to show a genuine issue of material fact exists as to how the sandwich sign was placed at the time of the incident, or whether a different placement would have prevented the sign from blowing over in 50-60 m.p.h. winds. Accordingly, we reject plaintiff's first claim.

{¶16} In her second issue for review, plaintiff argues the trial court erroneously found the sandwich sign had not previously blown over in the four years it was placed in front of Brick Street Bar. Plaintiff argues she presented evidence showing a genuine issue of material fact existed as to whether defendant knew the sign was "susceptible to being knocked over and that it was likely injury would result." To support her argument, plaintiff relies on the deposition of Amy Keirle, who stated she had previously seen the sandwich sign "lying" on the sidewalk. This testimony is not evidence of the relevant issue in this case: that defendant's sandwich sign had previously *blown* over as a result of wind. As defendant correctly asserts, plaintiff ignores the remainder of Keirle's testimony wherein she admitted she had never witnessed the sign blow over prior to September 8, 2007, nor had she seen the sign lying on the ground when it was storming or "especially windy" outside. Thus, plaintiff's evidence is hardly sufficient to create a genuine issue of material fact regarding whether the sandwich sign had previously blown over or that defendant had notice thereof. Because there is no factual dispute over this issue, we reject plaintiff's second claim.

{¶17} In her third issue for review, plaintiff argues there is a genuine issue of material fact as to whether the "placement and/or lack of safety features" on the sandwich

sign was the proximate cause of her injury. In support of her claim, plaintiff relies solely on the affidavit of George Wharton, a mechanical engineer, who calculated various wind speeds required to topple the sandwich sign. Wharton indicated that additional safety features such as a lock bar or supplemental weights would have increased the stability of the sandwich sign. However, Wharton did *not* indicate, nor did any other evidence show, that the aforementioned safety features would have maintained the sign's stability in 50-60 m.p.h. winds. Thus, plaintiff has failed to show a genuine issue of material fact exists as to whether the lack of safety features was the proximate cause of her injury. Accordingly, we reject plaintiff's third claim.

{¶18} In her fourth issue for review, plaintiff argues defendant placed the sandwich sign in the "middle of the sidewalk" in violation of Oxford Codified Ordinances 1151.04(C)(2), which prohibits signs from extending more than five feet into the public right-of-way. However, upon review of the record, we find plaintiff presented no evidence showing that placing the sandwich sign closer to Brick Street Bar would have prevented it from blowing over in the sudden, excessive winds. Accordingly, we find reasonable minds could only conclude that defendant's alleged violation of Oxford Codified Ordinances 1151.04(C)(2) was not the proximate cause of the accident or plaintiff's injury.

{¶19} On a related note, plaintiff uses the same ordinance to define her relationship and the duty of care defendant owed her. Specifically, plaintiff argues defendant breached its duty of "ordinary care" by unlawfully placing the sign in the public right-of-way, which made the sign "susceptible to being knocked over, and that it was likely injury would result." We disagree.

{¶20} Upon review of Oxford Codified Ordinances Chapter 1151, we find the ordinance creates no standard of care whatsoever. As defendant correctly notes, the purpose of Oxford Codified Ordinances Chapter 1151 is to "[e]nsure that signs are located

and designed to maintain a safe and orderly pedestrian and vehicular environment." Plaintiff makes no argument that she was injured as a result of her inability to walk unimpeded on the sidewalk. Accordingly, in determining what duty, if any, defendant owed plaintiff, it is immaterial whether defendant violated the ordinance.

{¶21} Moreover, we find plaintiff failed to demonstrate that defendant breached any other duty of care. In general, the threshold question of the existence of a duty is a question of law and depends on the foreseeability of the injury. *Barnett v. Beazer Homes Invests*., *L*.*L*.*C*., Butler App. No. CA2007-11-276, 2008-Ohio-6756, ¶14. An injury is foreseeable if defendant knew or should have known that its act was likely to result in harm to someone. Id.

{¶22} In the case at bar, there is certainly no dispute that *if* the sandwich sign toppled onto a bystander, it is foreseeable that an injury would ensue. However, this is not the relevant inquiry. Instead, the relevant inquiry is whether it was foreseeable that the sandwich sign was likely to be blown over by the wind if placed outside.

{¶23} Upon review of the record, there is absolutely no evidence that winds of any nature toppled the sandwich sign prior to September 8, 2007. In fact, Mark Weisman, CEO of defendant Weisman Enterprises Holdings, Inc., stated he was "surprised" to learn of the incident because he had never experienced the sign blowing over in the four years he had used it. Similarly, two managers of Brick Street Bar averred they had no knowledge of the sign falling over in the past three years under any circumstances. As previously discussed, plaintiff presented no specific evidence to the contrary. Under these facts, we conclude plaintiff's injury was not foreseeable, as defendant had no knowledge that the sign would fall over as a result of the wind, let alone a sudden, excessive windstorm.

{¶24} As further proof of the unforeseeable nature of the winds (and therefore the

accident and injury), a forensic meteorology report indicated that on September 8, 2007, winds were predicted to reach 5-10 m.p.h. The meteorology report further stated that the wind behaved as predicted except for a period between 4:20 p.m. and 4:40 p.m., where wind gusts reached 50-60 m.p.h. Moreover, it is undisputed that only one to two minutes elapsed between the windstorm and plaintiff's injury. This evidence clearly does not sustain a finding that the excessive winds existed for such a length of time that, by the exercise of any standard of care, defendant ought to have discovered the danger and removed the sign before it injured plaintiff. Under these facts, reasonable minds could only conclude that plaintiff's injury resulted from an entirely unforeseeable chain of events beyond defendant's control. Accordingly, we reject plaintiff's fourth claim.

{¶25} In sum, we find plaintiff failed to set forth sufficient evidence of the elements necessary to create a jury question with regard to defendant's negligence. Specifically, the evidence showed defendant owed no duty to protect plaintiff from an unforeseeable windstorm, nor did defendant have requisite notice of the storm to prevent the accident. In addition, plaintiff failed to set forth specific facts indicating any alleged mismanagement of the sandwich sign was the proximate cause of her injury. Instead, the evidence shows that 50-60 m.p.h. winds were an extraordinary natural phenomenon on a day predicted to produce 5-10 m.p.h. winds. Thus, we find plaintiff has failed to meet her burden under Civ.R. 56(E) to "set forth specific facts showing that there is a genuine issue for trial."

{¶26} We also reject plaintiff's assertion that the trial court failed to construe the evidence in a light most favorable to her, as the nonmoving party. Plaintiff argues the trial court only considered defendant's evidence in finding that defendant's use and placement of the sign was not the proximate cause of her injury.

{¶27} Contrary to plaintiff's assertion, the trial court clearly stated: "[i]n viewing the evidence in a light most favorable to the Plaintiff, reasonable minds [could] only conclude

that the Defendant's placement of the sign and lack of weights or lock bar was not the proximate cause of the Plaintiff's injury." The trial court then indicated that there was no evidence before the court to support a finding to the contrary.

{¶28} We agree with the trial court that plaintiff failed to set forth specific facts to prove defendant breached any applicable duty of care, or that but for defendant's alleged mismanagement of the sign, plaintiff's injury would not have occurred. Under these circumstances, we decline plaintiff's invitation to assume facts that were clearly uncontroverted during the summary judgment exercise.

Act of God Defense

{¶29} Pursuant to a finding that plaintiff's injury was not the result of defendant's negligence, the trial court found defendant successfully established that an Act of God was the exclusive and proximate cause of plaintiff's injury. We agree.

{¶30} Pursuant to *Piqua*, "[a]n injury may be attributed to an act [sic] of God where it is due directly and exclusively to an unforeseeable force of nature without human intervention." *Piqua,* 98 Ohio St. at 48.

{¶31} As previously discussed, the evidence in this case does not support a finding of negligence. Moreover, there is no evidence that defendant could have reasonably anticipated, guarded against or foreseen the 50-60 m.p.h. winds, or could have prevented the accident in the mere minutes between the windstorm and plaintiff's injury. In viewing the evidence in the light most favorable to plaintiff, we can only conclude the windstorm was an Act of God, which barred plaintiff's claims as a matter of law.

{¶32} Accordingly, plaintiff's sole assignment of error is overruled and the trial court's judgment is affirmed.

RINGLAND and HENDRICKSON, JJ., concur.