[Cite as *Dealey v. Ohio Dept. of Transp.*, 2019-Ohio-4048.]

LARRY DEALEY Plaintiff v. OHIO DEPARTMENT OF TRANSPORTATION, et al. Defendants	Case No. 2018-01158JD Judge Patrick M. McGrath Magistrate Gary Peterson ENTRY GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

{¶1} On June 17, 2019, defendants filed a motion pursuant to Civ.R. 56(B) for summary judgment. On July 23, 2019, without leave of court, plaintiff, through counsel, filed a memorandum in opposition.[1] On July 24, 2019, defendants filed a motion to strike the memorandum in opposition inasmuch as the memorandum was untimely filed. In the interests of justice, the court will consider the memorandum in opposition. Defendants' motion to strike is DENIED. The motion for summary judgment is now before the court for a non-oral hearing pursuant to L.C.C.R. 4(D).

{¶2} Civ.R. 56(C) states, in part, as follows:

{¶3} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, 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. No evidence or stipulation may be considered except as stated in this rule. 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

[1]The memorandum was filed by Attorney Steven Diller; however, Attorney Diller did not file a notice of appearance in this matter.

have the evidence or stipulation construed most strongly in the party's favor." *See also Gilbert v. Summit Cty*., 104 Ohio St.3d 660, 2004-Ohio-7108, citing *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317 (1977).

{¶4} Plaintiff, acting pro se, initiated this action by filing a complaint using a claim form that is available on the court's website. Plaintiff identified the responsible state agency as the Department of Transportation (ODOT) and stated that the damage occurred in the fall of 2017 on his rental lot located on U.S. 30 West in Tully Township, Van Wert County, Ohio. Plaintiff indicates that he learned of the damage to his property at a later date. Regarding the basis for his claim, plaintiff provides as follows: "State came on my land and drove over my septic tank crushing the top in." Plaintiff states that he now requires the removal of the old septic system, installation of a new one, and several loads of dirt. Plaintiff indicates that the state assured him that it would take care of things. No other details are provided.

{¶5} In the complaint, plaintiff does not identify the legal theory under which he seeks relief; however, the parties agree in their respective memoranda that this case arises out of alleged negligence.

{¶6} "In order to sustain an action for negligence, a plaintiff must show the existence of a duty owing from the defendant to the plaintiff or injured party, a breach of that duty, and that the breach was the proximate cause of resulting damages." *Sparre v. Dept. of Transp.*, 2013-Ohio-4153, 998 N.E.2d 883, ¶ 9 (10th Dist.).

{¶7} "It is well settled that in order for a person to be entitled to recover in damages for a claimed negligent injury, the act complained of must be the direct and proximate cause of the injury." *Strother v. Hutchinson*, 67 Ohio St.2d 282, 287 (1981)

{¶8} "'The term "proximate cause," is often difficult of exact definition as applied to the facts of a particular case. However, it is generally true that, where an original act is wrongful or negligent and in a natural and continuous sequence produces a result which would not have taken place without the act, proximate cause is established, and

the fact that some other act unites with the original act to cause injury does not relieve the initial offender from liability.'" *Id*., quoting *Clinger v. Duncan*, 166 Ohio St. 216, 223 (1957).

{¶9} "It is because what constitutes a 'natural and continuous sequence' is insusceptible of determination other than in the context of a particular case that the issue of proximate cause is ordinarily one for determination by the jury. However, where reasonable minds could not differ with respect to the matter because the circumstances clearly indicate an obvious cause and effect relationship, the issue may be determined as a matter of law." *Ornella v. Robertson*, 14 Ohio St.2d 144, 151 (1968). "'[W]here no facts are alleged justifying any reasonable inference that the acts or failure of the defendant constitute the proximate cause of the injury, there is nothing for the [trier of fact] (to decide), and, as a matter of law, judgment must be given for the defendant.'" *Sullivan v. Heritage Lounge*, 10th Franklin Dist. No. 04AP-1261, 2005-Ohio-4675, ¶ 33, quoting *Stuller v. Price*, 10th Dist. Franklin No. 03AP-66, 2004-Ohio-4416, ¶ 70. "It is well settled that the issue of proximate cause is not subject to speculation and that conjecture as to whether a breach caused the particular damage is insufficient as a matter of law. If the plaintiff's quantity or quality of evidence on proximate cause requires speculation and conjecture to determine the cause of the event, the defendant is entitled to summary judgment as a matter of law." (Citations omitted.) *Mills v. Best Western Springdale*, 10th Dist. Franklin No. 08AP-1022, 2009-Ohio-2901, ¶ 20. Accordingly, summary judgment is appropriate where reasonable minds could not differ as to the proximate cause.

{¶10} Defendants argue in their motion that plaintiff cannot show that the septic system was damaged by ODOT's actions. In support of their motion, defendants submitted the affidavits of Pat McConn and Ron Leffel. McConn, a transportation manager for ODOT, avers that on November 9, 2017, he and his team were positioning mowers in preparation for mowing along U.S. 30. McConn states that the mowers

were being parked near a driveway on plaintiff's property. McConn recalls that the grass and other plants were high and it appeared that the grass had not been mowed in some time.

{¶11} McConn avers that when the first mower was pulled into place, the right tire dropped into a hole. After the mower was removed, McConn noticed multiple holes in a 10-foot to 30-foot radius around where the mower was. McConn states that it looked like the ground had collapsed. Regarding the specific hole into which the mower had dropped, McConn avers that there was concrete, dirt, and grass at the bottom. Although there had formerly been a house trailer on the property, it was no longer there.

{¶12} Leffel, a transportation administrator for ODOT in Van Wert County, avers that on November 21, 2017, he viewed plaintiff's property, which was devoid of buildings. Leffel recalls that there were several holes on the property. Leffel states that some of the holes looked like they had been dug with a backhoe or other large machine and that others looked like the ground had collapsed. Leffel adds that when he looked into the hole the mower had dropped into, there was what appeared to be a non-functional septic system filled with grass and dirt.

{¶13} In response, plaintiff submitted his own affidavit wherein he avers that he is the owner of real property with the northern boundary being U.S. 30. Plaintiff states that there previously was a house trailer occupied by a tenant who resided on the property until approximately 2009. Plaintiff provides that the entire time the tenant occupied the house trailer, the tenant used the septic system and the well serving the house trailer and both were functional. Plaintiff explains that upon removal of the house trailer, other than to detach and seal the lines to the septic system and well, the septic system was intact and would simply have required an inspection and reattachment of the lines to again be functional.

{¶14} Plaintiff further provides that from time to time since the removal of the house trailer, he would occasionally visit the property and that he was never aware that

the septic system had caved in or otherwise had been altered from the state that existed at the time the lines were sealed.

{¶15} Plaintiff avers that representatives from ODOT contacted him to resolve the issue, but he was advised that it could not be resolved. Plaintiff states that his intention was to leave the system intact if a prospective buyer wished to use the property for a residence, but now that the septic system has been damaged, regulations governing septic systems required its complete removal.

{¶16} Upon review of the evidence submitted by the parties, the court can only conclude that plaintiff cannot establish that the actions of ODOT employees proximately caused any harm. There is no dispute that subsequent to 2009, the property, which was previously occupied by a tenant with a house trailer, was vacant. The house trailer was connected to a septic system, but the septic system was sealed when the tenant departed in 2009.

{¶17} There is also no dispute that on November 9, 2017, McConn led a team in preparation to mow to park mowers on plaintiff's property. The tire of one mower dropped into a hole on plaintiff's property. McConn noticed other holes in a 10-foot to 30-foot radius around where the mower was. To McConn, it appeared that the ground had collapsed and that when he looked in the hole in which the mower fell, he discovered dirt, grass, and concrete at the bottom of the hole.

{¶18} It is unrebutted that on November 21, 2017, Leffel viewed plaintiff's property and discovered several holes on the property. To Leffel, it looked like some of the holes were dug by a large machine, possibly a backhoe, and that it looked like the ground had collapsed. Leffel looked at the hole where the mower tire had dropped and saw what appeared to be a non-functional septic system filled with grass and dirt.

{¶19} Plaintiff has not presented the court with any evidence that ODOT's actions proximately caused damage to his septic system. There is no evidence before the court that the septic system was in working condition on November 9, 2017. Plaintiff's

assertion that the septic system was functional in 2009, 8 years before the events of this case, requires the court to speculate as to the condition of the septic system on November 9, 2017. Additionally, defendants presented evidence that indicates that the septic system was not functioning on November 9, 2017. It is not disputed that there were multiple holes in the area of the septic system, and that dirt, grass, and concrete were visible at the bottom of the hole where the mower tire fell. There is no evidence before the court to indicate that the mower created the hole when it parked; rather, the only evidence before the court is McConn's unrebutted statement that the tire dropped into a hole. Furthermore, both McConn and Leffel observed what appeared to be collapsed ground at the location of the sceptic system and to Leffel, it appeared that some of the holes had been dug by a large machine, possibly a backhoe. Accordingly, the only reasonable inference is that plaintiff cannot establish that ODOT's actions proximately caused damage to his septic system.

{¶20} To the extent plaintiff's complaint can be construed to include a claim for promissory estoppel, plaintiff failed to identify any clear and unambiguous promise upon which he could reasonably rely. *Raabe v. Ohio Bd. of Speech-Language Pathology and Audiology*, 10th Dist. Franklin No. 04AP-954, 2005-Ohio-2335, ¶ 28.

{¶21} Based upon the foregoing, the court concludes that there are no genuine issues of material fact and that defendant is entitled to judgment as a matter of law. Defendant's motion for summary judgment is GRANTED and judgment is hereby rendered in favor of defendant. All previously scheduled events are VACATED. Court

costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

PATRICK M. MCGRATH
Judge

Filed August 28, 2019
Sent to S.C. Reporter 10/2/19