[Cite as *McQueen v. Perry*, 2012-Ohio-5522.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Kim McQueen,	:	
Plaintiff-Appellant,	:	
v.	:	No. 12AP-237 (C.P.C. No. 11 CVC 4813)
Glenn C. Perry,	:	(REGULAR CALENDAR)
Defendant-Appellee,	:	

D E C I S I O N

Rendered on November 29, 2012

Bashein & Bashein Co., L.P.A., W. Craig Bashein and *Anthony N. Palombo; George Oryshkewych*; *Paul W. Flowers Co., L.P.A.,* and *Paul W. Flowers* for appellant.

Gallagher, Gams, Pryor, Tallan & Littrell L.L.P., Belinda S. Barnes and *Benjamin W. Wright*, for appellee.

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶ 1} Plaintiff-appellant, Kim McQueen, appeals the granting of defendant–appellee, Glenn C. Perry's motion for summary judgment by the Franklin County Court of Common Pleas dismissing her negligence claim. For the following reasons, we sustain McQueen's assignment of error and remand the trial court's decision.

{¶ 2} McQueen brings one assignment of error:

> THE TRIAL JUDGE ERRED, AS A MATTER OF LAW, BY GRANTING SUMMARY JUDGMENT UPON PLAINTIFF-APPELLANT'S CLAIMS OF NEGLIGENCE.

{¶ 3} This case arises out of an auto accident that occurred on the morning of October 15, 2009 near the intersection of West Broad Street and Westgate Avenue in

Columbus, Ohio. McQueen was walking across West Broad Street outside of a crosswalk and was struck by Perry as he was traveling eastbound.

{¶ 4} McQueen filed this action alleging that Perry's "negligence in failing to maintain a proper look-out on the roadway, in failing to obey the posted speed limit, and in failing to exercise due care" proximately caused her injuries. Complaint, at ¶ 3. Perry moved for summary judgment which was granted on February 24, 2012. McQueen timely appealed the granting of summary judgment.

{¶ 5} Civ.R. 56(C) states that summary judgment shall be rendered forthwith if:

> [T]he 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.

{¶ 6} Accordingly, summary judgment is appropriate only where: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) viewing the evidence most strongly in favor of the non-moving party, reasonable minds can come to but one conclusion and that conclusion is adverse to the non-moving party. *Tokles & Son, Inc. v. Midwestern Indemn. Co.*, 65 Ohio St.3d 621, 629 (1992), citing *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 65-66 (1978). "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record * * * which demonstrate the absence of a genuine issue of fact on a material element of the non-moving party's claim." *Dresher v. Burt*, 75 Ohio St.3d 280, 292 (1996). Once the moving party meets its initial burden, the non-moving party must then produce competent evidence showing that there is a genuine issue for trial. *Id.* Summary judgment is a procedural device to terminate litigation, so it must be awarded cautiously with any doubts resolved in favor of the non-moving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-59 (1992).

{¶ 7} De novo review is well established as the standard of review for summary judgment. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996). We stand in the shoes of the trial court and conduct an independent review of the record applying the

same summary judgment standard. As such, we must affirm the trial court's judgment if any of the grounds raised by the moving party, at the trial court, are found to support it, even if the trial court failed to consider those grounds. *See Dresher*; *Coventry Twp. v. Ecker*, 101 Ohio App.3d 38, 41-42 (9th Dist.1995).

{¶ 8} McQueen failed to comply with the provisions of R.C. 4511.46(B), which prohibits a pedestrian from leaving a point of safety and walking into the path of a vehicle. R.C. 4511.48(A) states that "[e]very pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right of way to all vehicles * * * upon the roadway." Further, McQueen pled guilty to violating Columbus City Ordinance 2171.03(c), which states: "Between adjacent intersections at which traffic control signals are in operation, pedestrians shall not cross at any place except in a crosswalk."

{¶ 9} Failure to comply with a legislative enactment is evidence of McQueen's negligence. For purposes of summary judgment, McQueen is negligent for failing to comply by crossing outside the crosswalk which has a causal relation to her injuries.

{¶ 10} McQueen argues, however, that Perry's negligence also was a cause of her injuries. A claim of negligence requires the plaintiff to show the existence of a duty, a breach of that duty, and an injury resulting proximately from the breach. *Menifee v. Ohio Welding Prods., Inc.*, 15 Ohio St.3d 75, 77 (1984). "In order to overcome a properly supported motion for summary judgment on a negligence claim, a plaintiff must identify a duty owed him by the defendant." *Midwestern Indemn. Co. v. Wiser*, 144 Ohio App.3d 354 (11th Dist.2001). The existence of a duty is a question of law. *Mussivand v. David*, 45 Ohio St.3d 314 (1989). "Whether a duty exists depends on the foreseeability of injury. Injury is foreseeable if a defendant knew or should have known that his act was likely to result in harm to someone." (Citations omitted.) *Huston v. Konieczny*, 52 Ohio St.3d 214, 217 (1990). Although a duty may be established by common law or a legislative enactment, whether a duty exists depends on the foreseeability of the injury. *Eisenhuth v. Moneyhon*, 161 Ohio St. 367 (1954), paragraph one of the syllabus; *Menifee* at 77.

{¶ 11} Generally, a motor vehicle has the right to proceed uninterruptedly in a lawful manner in the direction in which it is traveling in preference to any vehicle or pedestrian approaching from a different direction into its path. R.C. 4511.01(UU)(1).

Pedestrians crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right-of-way to all vehicles. R.C. 4511.48(A). No pedestrian shall cross a roadway at a place other than a crosswalk except in cases where crosswalks are an unreasonable distance apart. Columbus City Ordinance 2171.05(d). Under the noted statutes alone, Perry did not owe a duty of care to McQueen when she was in his right-of-way. *See Deming v. Osinski*, 24 Ohio St.2d 179, 180-81 (1970). *See also Wall v. Sprague*, 12th Dist. No. CA2007-05-065, 2008-Ohio-3384, ¶ 13; *Leahy v. Richardson*, 5th Dist. No. 10CAE080065, 2011-Ohio-3214, ¶ 71, 77.

{¶ 12} The operator of a motor vehicle nonetheless must exercise due care to avoid colliding with a pedestrian in his right-of-way upon discovering a dangerous or perilous situation. R.C. 4511.48(E); *Deming* at 180-81. Perry stated that he braked his vehicle when he saw McQueen. Perry deposition, at 20-21, 35 (hereinafter "Perry Depo. __").

{¶ 13} The contributory or comparative negligence *of the driver* with the right-of-way does not become an issue for trial without evidence that the driver with the right-of-way was also driving unlawfully. *Wallace v. Hipp*, 6th Dist. No. L-11-1052, 2012-Ohio-623, ¶ 16. McQueen argues Perry was driving unlawfully in that he saw her but did not stop before hitting her. McQueen argues that Perry failed to maintain an assured clear distance ahead in violation of R.C. 4511.21 arguing that his speed was excessive in dark and raining conditions.

{¶ 14} The assured clear distance statute is a specific requirement of law, a violation of which constitutes negligence per se. However, a collision does not equal a violation in every case. Violation of the statute and a finding of negligence per se depends on whether 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. *Blair v. Goff-Kirby Co.*, 49 Ohio St.2d 5, 7 (1976). Cases involving the assured clear distance ahead statute require evaluation of the conduct of the driver in light of the facts surrounding the collision. *Purcell v. Norris*, 10th Dist. No. 04AP-1281, 2006-Ohio-1473, ¶ 16.

{¶ 15} As to the fourth prong, there is disputed evidence between the parties as to the conditions that may or may not have rendered McQueen reasonably discernible. It was raining that morning, and there were cars in the westbound lanes with their headlights on that would shine towards any eastbound traffic. McQueen stated that the accident occurred sometime around 7:00 a.m., while Perry states that the accident occurred between 7:00 and 7:30 a.m. Perry indicates that the police report stated the accident occurred at 7:34 a.m. However, the police report was never submitted to the trial court. Perry Depo., at 11. McQueen stated in her deposition that at the time of the accident, it was raining but it was daylight. McQueen deposition, at 57. Perry states that it was dark. Perry deposition, at 11. The sunrise on October 15, 2009 was at 7:42 a.m. Viewing the evidence most strongly in favor of Perry creates a genuine issue of material fact as to whether McQueen was reasonably discernible. This would be the fourth prong of an accrued clear distance violation which, if proven, could render Perry negligent. Summary judgment therefore was not appropriate in this case.

{¶ 16} McQueen also argues that Perry had crossed the centerline into the westbound lane when he struck her. Perry states that he was entirely in his lane when the accident occurred and that McQueen was in his lane within a few inches of the dividing yellow line and that McQueen was not walking, but was standing still for the two-to-four seconds that Perry saw her before impact. Perry affidavit; Perry Depo., at 15. Perry argues that McQueen's affidavit, which was submitted after Perry's motion for summary judgment, differs from both Perry's version and from McQueen's own deposition which was given before the motion for summary judgment as to where McQueen was and what she was doing when she was struck.

{¶ 17} With respect to the affidavits and depositions of the parties to a summary judgment motion, we follow the holdings of the Supreme Court of Ohio:

> [W]hen an inconsistent affidavit is presented in support of, or in opposition to, a motion for summary judgment, a trial court must consider whether the affidavit contradicts or merely supplements the affiant's earlier sworn testimony. A movant's contradictory affidavit will prevent summary judgment in that party's favor. A nonmoving party's contradictory affidavit must sufficiently explain the contradiction before a genuine issue of material fact is created.

Bryd v. Smith, 110 Ohio St.3d 24, 2006-Ohio-3455, ¶ 29.

{¶ 18} There are inconsistencies between McQueen's deposition and her affidavit as to where she was when she was struck, whether she saw Perry's car, and whether she was standing still or walking when the accident occurred.

{¶ 19} McQueen stated in her deposition on the issue of whether she saw Perry's vehicle before the accident:

> A. Where he came from, I don't know. I never saw him.
>
> Q. You never saw my client's car at all?
>
> A. His car was not coming eastbound when I started, because I wouldn't have never crossed in front of you, you know, had he been coming like that. The eastbound side was totally clear.
>
> Q. Is it fair to say you never saw my client's car before you [sic] accident?
>
> A. Right.

McQueen Depo., at 67.

{¶ 20} While McQueen's affidavit states "an eastbound vehicle was approaching in the distance [Perry's vehicle]." McQueen affidavit, at ¶ 5. "The Defendant's vehicle crossed left of center, over the double yellow line, right before I was struck. I was standing fully in the westbound lane of West Broad when I was hit." McQueen affidavit, at ¶ 7. "Prior to the impact, I intentionally moved myself well into the westbound lanes of West Broad Street to make sure I was not near the eastbound lane that the defendant was travelling in." McQueen affidavit, at ¶ 8.

{¶ 21} There is a clear inconsistency between McQueen's deposition and her affidavit. McQueen stated in her deposition she did not see Perry's car. This is in direct contradiction to her affidavit which gives no explanation as to this contradiction. Any evidence based on McQueen's observation of Perry's vehicle does not create a genuine issue of material fact. Whether McQueen saw Perry is not as significant to Perry's negligence as whether Perry saw McQueen.

{¶ 22} McQueen stated in her deposition as to whether she was moving or standing still when struck:

A. The cars on the westbound side had stopped. I'm crossing. So next thing I know I wake up in the hospital.

* * *

Q. Were you moving at the time you were hit, were you walking or standing still?

A. I stepped over the line. I didn't even know I was hit until I woke up. That's how fast it happened. Where he came from, I don't know. I never saw him.

* * *

Q. Were you standing in the center of the road for a period of time before the westbound cars stopped? Were you standing there waiting for them to either stop or go by?

A. Yeah, I did stand there to make sure.

Q. How long were you standing there?

A. Just long enough for them to stop.

Q. Do you know how long that was?

A. No.

* * *

Q. Do you know how long [you] were just standing there waiting?

A. No.

* * *

Q. The first thing you remember after standing in the center of the street waiting for the cars (in the westbound lane) is waking up in the hospital?

A. Right.

McQueen deposition, at 66, 67, 83, 84-85.

{¶ 23} While her affidavit states:

> 5. I was standing on the double yellow line waiting to cross the westbound lanes for at least 10 seconds. During this time, several westbound cars stopped to allow me to cross. At that time, I took several steps into the westbound lanes before beginning to fully cross those lanes. I did this because an eastbound vehicle was approaching in the distance.
>
> 6. As I was standing several feet into the far left westbound lane, I was struck by a large sport utility vehicle * * *.
>
> 7. The Defendant's vehicle crossed left of center, over the double yellow line, right before I was struck. I was standing fully in the westbound lane of West Broad when I was hit.

{¶ 24} Once again there are inconsistencies between McQueen's deposition and her affidavit, as well as inconsistency within McQueen's own deposition. While there is not a clear contradiction between the deposition and the affidavit, it is not clear that the affidavit only supplements the deposition. A further analysis of these two pieces is appropriate for a trier of fact, and not on a summary judgment motion. Whether McQueen was standing still goes to the second prong of an assured clear distance violation.

{¶ 25} McQueen stated in her deposition as to whether she had crossed the double centerline and was in the westbound lanes of traffic when struck:

> Q. Tell me what you remember about the accident.
>
> A. I remember getting off the bus on the eastbound side, no cars was coming eastbound. I crossed the eastbound side, got to the double yellow line in the street, actually stepped over the double yellow line because the cars that was coming westbound they stopped so that I could go past. But eastbound was clear. From my understanding, he was coming eastbound, so I don't even know -- I was across had the yellow line. I could see the curb. That's how close I was over the yellow line.
>
> Q. What do you mean you could see the curb?
>
> A. I mean, the [sic] I could see the curb like right here -- here's the double yellow line. I'm over the double yellow line. The cars on the westbound side had stopped. I'm crossing. So next thing I know I wake up in the hospital.

> Q. Was there -- is there a center lane between the east and westbound lanes there where you can get in and turn?
>
> A. No.
>
> Q. The west and eastbound lanes are right together there.
>
> A. Right. And it's the double yellow line.
>
> * * *
>
> Q. Were you moving at the time you were hit, were you walking or standing still?
>
> A. I stepped over the line. I didn't even know I was hit until I woke up. That's how fast it happened.
>
> * * *
>
> Q. The first thing you remember after standing in the center of the street waiting for the cars [in the westbound lane] is waking up in the hospital?
>
> A. Right.

McQueen deposition, at 65-67, 85.

{¶ 26} While McQueen's affidavit states:

> 5. At that time, I took several steps into the westbound lanes before beginning to fully cross those lanes. I did this because an eastbound vehicle was approaching in the distance.
>
> 6. As I was standing several feet into the far left westbound lane, I was struck by a large sport utility vehicle * * *.
>
> 7. The Defendant's vehicle crossed left of center, over the double yellow line, right before I was struck. I was standing fully in the westbound lane of West Broad when I was hit.
>
> 8. Prior to the impact, I intentionally moved myself well into the westbound lanes of West Broad Street to make sure I was not near the eastbound lane that the defendant was travelling in.

{¶ 27} Here again inconsistency exists but we do not find that they can only be viewed as contradictions. Reading the facts in favor of McQueen, her depositions read that she crossed the eastbound lanes, and she was standing at the center yellow line waiting for westbound traffic to stop. She had either just begun to cross or was stepping over the yellow line when she was hit by Perry's car, which she neither saw nor heard. This could be supplemented by her affidavit which says that she was standing several feet in the westbound lane to avoid Perry's vehicle which she saw coming in the eastbound lane. Thus, there is a genuine issue of fact as to whether McQueen was in the westbound lane or not, when struck.

{¶ 28} Therefore, we conclude, after construing the evidence most strongly in favor of McQueen, that there are genuine issues of material fact in this case and that summary judgment was not appropriate. McQueen was clearly negligent for crossing outside the crosswalk. However, construing the facts most favorably to her, Perry's negligence may have been greater.

{¶ 29} McQueen's assignment of error is sustained and the judgment of the Franklin County Court of Common Pleas is reversed and this case is remanded for further proceedings consistent with this decision.

Judgment reversed and remanded
for further proceedings.

BRYANT and FRENCH, JJ., concur.