

[Cite as *Zieger v. Burchwell*, 2010-Ohio-2174.]

IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT OF OHIO  
CLERMONT COUNTY

HEATHER ZIEGER,	:	
Plaintiff-Appellant,	:	CASE NO. CA2009-11-077
- vs -	:	<u>OPINION</u>
	:	5/17/2010
MARY R. BURCHWELL,	:	
Defendant-Appellee.	:	

CIVIL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS  
Case No. CA2009-11-077

Brett Goodson, Goodson & Company, Ltd., Stephanie Day, 110 East Eighth Street, Suite 200, Cincinnati, Ohio 45202-2132, for plaintiff-appellant

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**YOUNG, J.**

{¶1} Plaintiff-appellant, Heather May Zieger, appeals a decision of the Clermont County Court of Common Pleas granting summary judgment in favor of defendant-appellee, Mary Rachel Burchwell. For the reasons that follow, we affirm.

{¶2} On October 4, 2006, around 9:10 p.m., appellant and her boyfriend, Chris Jones, walked south across State Route 125 to go to the SuperAmerica

grocery store. On their way to the store, appellant and Jones used a nearby marked crosswalk to cross the highway. Traveling home, however, the pair took a different route, crossing near the intersection of Beverly Drive and S.R. 125, outside of the marked crosswalk they previously used. Before entering the highway, appellant checked for oncoming cars in the eastbound lanes of traffic. As they walked, Jones remained several feet ahead of appellant. As appellant entered the westbound lanes, she did not check for oncoming traffic, and thus did not see appellee's car approaching on her right.

{¶3} When appellant was several feet from the curb, appellee's vehicle struck her and propelled her into a nearby grassy area. As a result of the accident, appellant had two broken legs, shattered knees, pelvic and back fractures, and lacerations in her hip and thigh.

{¶4} In her deposition, appellee stated that at the time of the accident, she was traveling west in her 2006 Toyota Corolla around the 45 m.p.h. speed limit. She further testified that it was dark out, and when her headlights reflected off of the white grocery bag Jones was carrying, she slowed down to permit him to cross the road. As Jones crossed, appellee testified that she looked to her right to ensure that Jones had safely negotiated the rest of the highway. Appellee testified that she did not see appellant prior to the accident. As such, she did not apply her brakes or take any evasive action before the accident.

{¶5} Appellant filed suit against appellee, alleging that appellee was negligent, seeking damages in excess of \$25,000. On July 17, 2009, appellee moved for summary judgment, which the trial court granted on October 30, 2009. Appellant timely appealed, raising two assignments of error:

{¶16} Assignment of Error No. 1:

{¶17} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT IN RENDERING SUMMARY JUDGMENT IN FAVOR OF APPELLEE, DESPITE THE MANY GENUINE ISSUES OF MATERIAL FACT IN DISPUTE."

{¶18} Assignment of Error No. 2:

{¶19} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT IN RENDERING SUMMARY JUDGMENT IN FAVOR OF THE APPELLEE WHEN IT FOUND THAT APPELLEE OWED NO DUTY TO MS. ZIEGER TO KEEP A PROPER LOOKOUT."

{¶10} As these assignments of error are interrelated, for ease of discussion, we will address them together.

{¶11} Summary judgment is a procedural device used to terminate litigation and avoid a formal trial when there are no issues in a case to try. See *Forste v. Oakview Constr., Inc.*, Warren App. No. CA2009-05-054, 2009-Ohio-5516, ¶7. This court reviews summary judgment decisions de novo. Id. Summary judgment is appropriate under Civ.R. 56 when (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, said party being entitled to have the evidence construed most strongly in their favor. Id. at ¶8; *Zivich v. Mentor Soccer Club, Inc.*, 82 Ohio St.3d 367, 369-370, 1998-Ohio-389. A party seeking summary judgment bears the initial burden of informing the court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact as to the essential elements of the nonmoving party's claims. See *Higgins v. Bennett* (Mar. 6,

2000), Clinton App. No. CA99-08-022, 2. If the moving party satisfies its initial burden, the nonmoving party may not then rest upon the mere allegations or denials of the moving party's pleadings. *Id.* Rather, the nonmoving party's response, by affidavit or as otherwise provided in the rule, must set forth specific facts showing that there is a genuine issue for trial. *Id.*; Civ.R. 56(E).

{¶12} In the case at bar, appellant argues that appellee's negligence caused her injuries. Specifically, appellant presents four issues within her assignments of error: (1) genuine issues of material fact exist from which a reasonable jury could find that appellee "failed to yield the right-of-way" to appellant; (2) appellee breached her duty to keep a "proper lookout" for pedestrians in the roadway under R.C. 4511.48(E); (3) appellant's negligence, "if any, should be decided by a jury under the comparative negligence doctrine;" and (4) reasonable minds could conclude that appellee was negligent per se for failing to maintain an assured clear distance ahead. We will address each argument in turn.

### **Pedestrian's Right-of-Way**

{¶13} First, it is rudimentary that 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. *Higgins*, Clinton App. No. CA99-08-022 at 2. Appellant first argues that she had the right-of-way, and that appellee's failure to yield constituted negligence. Appellant argues that when she stepped off the curb into the eastbound lanes of traffic, she was across from the "T" intersection of Beverly Drive and S.R. 125. Appellant argues that this intersection created an "implied crosswalk" that permitted her to cross the highway with the "right to travel uninterrupted \* \* \* and to assume, in the absence of knowledge to the contrary, that others [would] obey

the law by not entering into her path of travel." Appellant points to the opinion of her accident reconstruction expert, who concluded, among other things, that appellant was within an "implied crosswalk" under R.C. 4511.01(LL)(1), which gave her the "legal right-of-way pursuant to [R.C.] 4511.46."

**{¶14}** The statutory definition of a crosswalk is as follows: "That part of a roadway at intersections ordinarily included within the real or projected prolongation of property lines and curb lines or, in the absence of curbs the edges of the traversable roadway[.]" R.C. 4511.01(LL)(1). Here, both parties' accident reconstruction experts calculated the approximate location of the "point of impact" in relation to the intersection of Beverly Drive and S.R. 125. Appellee's expert calculated that the accident occurred at least 44 feet to the east of the intersection. Similarly, appellant's expert placed the accident roughly 35 feet east of a utility pole used by a police officer as a reference point in his accident report. However, in reviewing the experts' diagrams, the trial court concluded that the utility pole itself was located to the east of the intersection – a fact that appellant failed to dispute. In other words, the evidence offered by both parties indicates that the accident occurred at least 35-44 feet away from the intersection of Beverly Drive and S.R. 125.

**{¶15}** The evidence also reveals that the paint chips from appellee's vehicle and appellant's belongings, including her grocery bags and purse, were all located to the east of the intersection. In light of the evidence presented, no genuine issue of material fact remains on the issue of whether appellant was in an implied crosswalk at the time of the accident. As to this issue, reasonable minds can come to but one conclusion, and that conclusion is adverse to appellant. The nearest potential "implied," or unmarked, crosswalk was located a minimum of 35 feet from the point of

impact – a distance too great to encompass even the widest of crosswalks, "implied" or otherwise. Thus, we find that the trial court correctly concluded that appellant was not in an implied crosswalk at the time of the accident, and that summary judgment on this issue was appropriate.

{¶16} If a pedestrian crosses a roadway "at any point *other* than within a marked crosswalk or within an unmarked crosswalk at an intersection," he or she must "yield the right of way to all vehicles upon the roadway." (Emphasis added.) R.C. 4511.48(A). In the case at bar, appellant admittedly failed to use a marked crosswalk. Because appellant failed to utilize either type of crosswalk, she was required to yield to the right-of-way of vehicles traveling along S.R. 125, including appellee's vehicle. See R.C. 4511.48(A). Thus, appellant's first argument that she had the right-of-way is meritless.

### **"Proper Lookout"**

{¶17} Appellant next argues that even if she was not in an implied crosswalk, appellee still had a duty to keep a "proper lookout" for pedestrians under R.C. 4511.48(E). Appellant specifically argues that this statutory section puts a duty on drivers to "see and avoid" pedestrians located "*anywhere* on a roadway[.]" (Emphasis sic.) However, appellant misstates the law.

{¶18} 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 crossing its path. *Higgins*, Clinton App. No. CA99-08-022 at 2; R.C. 4511.01(UU)(1). "A driver need not look for pedestrians or vehicles violating his right-of-way." *Id.*, citing *Deming v. Osinki* (1970), 24 Ohio St.2d 179, 180-81 (rejecting the notion that drivers in the right-of-way must

"look, look effectively and continue to look and remain alert"). Further, negligence is never presumed, it must be proven. *Higgins* at 3. "In an action based on negligence, the presumption exists that each party was in the exercise of ordinary care and such presumption prevails until rebutted by evidence to the contrary." *Biery v. Pennsylvania R.R. Co.* (1951), 156 Ohio St. 75, paragraph two of the syllabus. Therefore, the fact that a vehicle hits an individual on the roadway does not establish negligence. *Higgins* at 3.

{¶19} As previously mentioned, because appellant was not within an "implied crosswalk" at the time of the accident, it is clear that appellee had the right-of-way as she traveled westbound on S.R. 125. Appellant presented no evidence that appellee operated her motor vehicle in violation of any law or ordinance. It is undisputed that appellee was operating her motor vehicle within the legal speed limit at the time of the accident. In addition to appellant's expert's calculation that appellee was driving between 43 and 50 m.p.h., an independent witness to the accident testified that appellee was driving ahead of several other automobiles, but "wasn't pulling away \* \* \* from the other cars." Because appellee had the right-of-way, whether summary judgment was appropriate on appellant's second claim depends on whether appellee failed to exercise due care to avoid colliding with appellant.

{¶20} Appellant argues that when appellee "observed Mr. Jones in her lane of travel, she 'discovered a dangerous and perilous situation.'" Appellant argues that because she was "only 3-4 feet behind Mr. Jones \* \* \* [she] was clearly within the perilous situation discovered by [a]ppellee," who therefore had a "statutory duty" not to collide with appellant. Again, appellant misstates the current law in Ohio. Whether a duty exists depends on the foreseeability of the harm. *Higgins*, Clinton App. No.

CA99-08-022 at 2. The test for foreseeability is whether a reasonably prudent person would have anticipated that an injury was likely to result from the performance or non-performance of an act. See *Id.*; *Wallace v. Ohio Dept. of Commerce*, 96 Ohio St.3d 266, 2002-Ohio-4210, ¶23. In determining whether a reasonably prudent person would have perceived the risks of an injury, "only those circumstances which they perceived, or should have perceived, at the time of their respective actions should be considered." *Higgins* at 2, quoting *Menifee v. Ohio Welding Products* (1984), 15 Ohio St.3d 75, 77.

{¶21} It is common knowledge that many animals travel in packs, flocks, gaggles, or groups, and where one is present, there are likely more to follow. However, humans are no such animal. Simply because appellee noticed Mr. Jones traveling across the highway does not mean that a reasonably prudent driver would anticipate that another human would appear behind him. Simply stated, humans are not "pack" animals. Thus, we decline to hold that a reasonably prudent person should expect that multiple adults would attempt to cross a five-lane highway in the dark, without the use of crosswalks. Furthermore, appellant's own accident reconstruction expert stated that "motorists typically will notice an object/pedestrian to their *right* quicker than those to the left, primarily because low-beam headlight energy is directed to the right side of the roadway[.] \* \* \* [W]hen confronted with a low-contrast object, such as a pedestrian wearing dark clothing, low-beam headlights may not provide adequate detection-identification distance at speeds in excess of about 35 miles per hour. If the pedestrian is coming from the *left* side of the vehicle \* \* \* the situation can be appreciably worse." (Emphasis added.)

{¶22} In the case at bar, appellee drove west as appellant walked north, thus

approaching appellee's vehicle from the left side – which, according to appellant's own expert, is the side that motorists typically have more difficulty in perceiving pedestrians. Uncontested evidence reveals that appellee was using her headlights at the time of the accident. As previously stated, no evidence existed, nor was there any suggestion, that appellee was driving at an excessive speed. There is also no evidence on the record that appellee noticed appellant in time to anticipate or perceive any risk of injury to appellant. In fact, both parties testified that they did not see each other prior to the collision. Thus, in the absence of foreseeable injury or any material proof of negligence, we find that the trial court correctly concluded that appellee did not violate any duty of care toward appellant.

#### **Comparative Negligence Doctrine**

{¶23} Appellant's third issue relates to the doctrine of comparative negligence. Appellant essentially asserts that if she acted negligently in crossing the highway, reasonable minds could still conclude that appellee's negligence was the "greater proximate cause of the collision." However, in light of our prior determination that appellee breached no duty of care owed to appellant, there is no issue of comparative negligence between the parties in this case. Thus, we decline to address appellant's third issue presented on appeal.

#### **Assured Clear Distance Rule**

{¶24} In her fourth and final argument, appellant asserts that appellee was negligent per se for failing to maintain an assured clear distance ahead. R.C. 4511.21(A), the assured clear distance ahead statute, provides: "No person shall operate a motor vehicle \* \* \* at a speed greater or less than is reasonable or proper, having due regard to the traffic, surface, and width of the street or highway and any

other conditions, and no person shall drive any motor vehicle \* \* \* in and upon any street or highway at a greater speed than will permit the person to bring it to a stop within the assured clear distance ahead." A driver violates R.C. 4511.21(A) if she collides with an object that (1) is ahead of the driver in her path of travel; (2) is stationary or moving in the same direction as the driver; (3) did not suddenly appear in the driver's path; and (4) is reasonably discernible. *Wilson v. Maple*, Clermont App. No. CA2005-08-075, 2006-Ohio-3536, ¶13. A violation of R.C. 4511.21(A) is negligence per se. *Id.*

{¶25} Appellant argues that there is substantial evidence that she was in appellee's "lane of travel" because "[t]hat is where she was struck." Appellant also argues that she was "discernable" because she was wearing a white shirt and carrying two white plastic grocery bags. Appellant also argues that she was at a distance sufficiently far ahead of appellee to have made it possible for her to avoid the collision.

{¶26} In *Maple*, the evidence surrounding the collision between vehicle and pedestrian was similar to the case at bar. In *Maple*, neither party was cited for traffic violations, the road contour at the scene of the accident was "straight and level," the road conditions were wet, visibility was low because the weather was cloudy, and the pedestrian stood in the northbound lane of the road when he was struck by a vehicle traveling northbound, and he was not in a marked crosswalk. *Maple*, 2006-Ohio-3536 at ¶15. The parties did not dispute the first three elements of the assured clear distance claim, but disagreed as to whether the pedestrian was "reasonably discernable." Testimony revealed that the pedestrian wore dark blue pants and a "lighter" colored shirt, and that, despite the use of the driver's headlights, neither

party saw the other prior to the accident. Id. at ¶16. This court found that the evidence was "so one-sided" that "no reasonable jury could find that [the pedestrian] was reasonably discernible at the time of the accident." Id. at ¶20.

{¶27} After carefully reviewing the record in the case at bar, we find that the evidence is so one-sided that appellee was entitled to judgment as a matter of law on this issue. Here, as in *Maple*, neither party was cited for a traffic violation, the road was relatively straight and level, visibility was low because it was nighttime, and appellant crossed the road outside of a crosswalk. Like the pedestrian in *Maple*, appellant wore dark pants and a "lighter" colored (white) shirt, and, despite the use of appellee's headlights, neither party saw the other before the accident. However, unlike *Maple*, appellee crossed S.R. 125 in a northerly direction, perpendicular to appellee's westward path.

{¶28} On such evidence, no reasonable jury could find that appellant was (1) stationary or moving in the "same direction as the driver," as she walked north while appellee drove west; or (2) "reasonably discernable" at the time of the accident, when visibility was low, appellant was not in a crosswalk, and her clothing was not a sufficient indicator that a pedestrian was located ahead. Accordingly, appellee is also entitled to summary judgment on the claim that she was negligent for failing to maintain an assured clear distance in violation of R.C. 4511.21(A). Thus, we overrule appellant's two assignments of error.

{¶29} Judgment affirmed.

BRESSLER and RINGLAND, JJ., concur.