[Cite as *Parsons v. Braman*, 2009-Ohio-4777.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
HIGHLAND COUNTY

DAVID PARSONS, et al.,	:	Case No. 08CA20
	:	
Plaintiffs-Appellants,	:	
	:	DECISION AND
v.	:	JUDGMENT ENTRY
	:	
ROBERT BRAMAN,	:	
	:	**Released 9/4/09**
Defendant-Appellee.	:	

APPEARANCES:

John W. Slagle, Hillsboro, Ohio, for appellants.

Edward A. Dark, Wooster, Ohio, for appellee.

Harsha, J.

{¶1} David Parsons and his wife, Joyce Parsons ("the Parsons") filed claims against Robert Braman for negligence and loss of consortium after David incurred injuries in a bicycle crash. David allegedly hit an object while attempting to ride his bicycle from a public street onto the sidewalk on or abutting Braman's property in Hillsboro, Ohio. The Parsons appeal the trial court's decision entering summary judgment in Braman's favor. They contend that genuine issues of material fact remain for trial based on direct and circumstantial evidence they produced and that the trial court failed to properly consider Braman's alleged violation of Hillsboro City Ordinance Section 96.16 in reaching its decision.

{¶2} To evaluate the Parsons's arguments, we must initially determine what duty Braman owed to David. Because it is unclear from the record whether Braman

actually owned the sidewalk or the city of Hillsboro did, we analyze both potential scenarios.

{¶3} If Braman owned the sidewalk, under premises liability law David was at most a licensee on the property. A landowner has no duty to a licensee except to refrain from willful or wanton conduct and to warn the licensee of latent dangers on the property. The Parsons failed to produce any summary judgment evidence to show that Braman possessed an intent, purpose or design to injure David or failed to exercise any care whatsoever toward David's safety under circumstances in which there was a great probability of harm to him. They failed to establish what object allegedly caused David's crash, that the object was in a dangerous condition, or that Braman was responsible for it or even knew of its presence on the property or dangerous condition. Therefore, under a premises liability law analysis, the Parsons failed in their burden to set forth specific facts showing that there is a genuine issue for trial.

{¶4} If the city of Hillsboro owned the sidewalk, under *Eichorn v. Lustig's, Inc.* (1954), 161 Ohio St. 11, 117 N.E.2d 436, and its progeny, Braman cannot be liable for any injuries David sustained using the sidewalk abutting Braman's property unless (1) a statute imposed a specific duty on Braman to keep the sidewalk in good repair; (2) Braman's affirmative acts created or negligently maintained a defective or dangerous condition causing the injury; or (3) Braman negligently permitted a defective or dangerous condition to exist on the sidewalk for some private use or benefit. The Parsons failed to produce any summary judgment evidence to support the second and third exceptions. They could not establish what object allegedly caused David's crash, let alone establish that it was in a defective or dangerous condition because of

Braman's affirmative acts or because Braman permitted the condition to exist for some private use or benefit.

{¶5} The Parsons argue that the first exception applies because Hillsboro City Ordinance Section 96.16(A) imposed a duty on Braman to keep the sidewalk abutting his property "in good order and repair." But the clear language of the ordinance does not in and of itself impose civil liability on an abutting property owner if a private individual is injured on the sidewalk. Thus, as a matter of law, this ordinance imposes no duty on Braman for David's benefit. Therefore, the Parsons failed to establish any basis for Braman's liability under *Eichorn* and we affirm the trial court's judgment.

I. Facts

{¶6} In September 2007, the Parsons brought claims against Braman for negligence and loss of consortium. They alleged that on July 23, 2006, David was riding his bicycle on the street near the corner of East Street and South Street in Hillsboro, Ohio. He was injured when he attempted to enter the sidewalk and wrecked "due to a severely broken and deteriorated curbside, specifically at the location of 155 East South Street, Hillsboro, Ohio." The Parsons claimed that Braman owned or controlled the sidewalk, curb, and surrounding area and that he negligently maintained these areas.

{¶7} When asked at his deposition how the accident occurred, David testified that he was riding his bicycle on a sidewalk, crossed the street, and was attempting to enter the sidewalk on the opposite side of the road. Initially, he testified that before he got across the street, he hit a "rock so big it flipped [him] off" his bike and into a ditch. He also testified: "I went to go up on the curb, I thought the curb just went up, but there

was grass hiding it where you go up, and there was a rock, I don't know if it was already broke or if it broke when the bicycle front tire hit it, it threw me in the ditch[.]" Defense counsel then elicited the following testimony from David:

Q: And you said that you hit a rock, you said there was a large rock there that you hit?
A: Yes, like I said, there was something there, I thought it just went up like the way that, the way that one does right here, but when I went up there, there was a, I don't know if it was, I don't remember if it was broken or what the deal was. But when my front wheel hit it, it threw me back over this way, threw me into the hole.

Q: You described it earlier as being a rock, was there a rock there?
A: No, there was not a rock there.

Q: What did you mean when you said you hit a rock then?
A: Well, there was – I don't know what it was, a piece of the concrete maybe, I don't know. I know that when I come off of it, it was sheered off and a rock was laying down.

* * *

Q: Okay. What was it that you struck?
A: Sidewalk.

Q: You hit the sidewalk?
A: Evidently, because that is part of the sidewalk.

Q: Well, it is in these photographs, I don't know what was there on the day of the accident.
A: I think, like I said, I don't know, I don't mean to put it as a rock. You got me confused anyway, but I think it was part of the sidewalk.

Q: Was it attached to the sidewalk or was it a loose piece of some type of object?
A: I do not know, I don't know, I don't remember.

* * *

Q: Okay. When you rode your bicycle, again you're going through the cross walk, and it's part of the sidewalk or something within that area that your wheels struck?
A: Yes, it was somewhere through here.

Q: Did you see what it was that you struck? And again, I know you said you don't remember what it was, but did you see it before you hit it?
A: No, I couldn't see it because there was grass up above it, there was grass hiding it that's why I thought I could get up on it, if I knew it was – if I had known it was broken I would have got off my bicycle and took it up, I could not tell because grass was covering it.

* * *

Q: [I]s there a curb there, do you recall, or maybe was it the curb that you hit?
A: No, it wasn't the curb, no, no, it wasn't the curb.

Q: But you don't remember what it was, if I understood correctly?
A: Yes, I know it wasn't the curb though[.]

{¶8} During Braman's deposition, he testified that he never saw David before the deposition. He also testified that he owned the property located at 155 East South Street in Hillsboro, Ohio. However, when asked whether he believed the area where David claimed the accident happened, i.e. "just coming off the street onto the sidewalk," was city property, Braman simply responded "Don't know." Braman testified that the only maintenance he performed in that area prior to David's alleged accident was that he trimmed the grass so that the sidewalk line was visible. He testified that he was aware of a hole in the roadway by his property that contained a pipe. He claimed that he told the city about this problem, but the city did not fix it.

{¶9} After discovery, Braman moved for summary judgment, which the trial court granted. The court noted that given David's conflicting testimony, the Parsons failed to show what "specific object that [David] struck allegedly causing his crash." The court found that regardless of what object allegedly caused the crash, the Parsons failed to establish that the crash resulted from a breach of any duty Braman owed to David. In addition, the court found that nothing in the record showed that Braman knew

of any allegedly dangerous condition on the sidewalk or curb. The court also found that Hillsboro City Ordinance Section 96.16 did not impose strict liability on Braman. The court noted that the Parsons failed to prove that Braman even violated the ordinance or that the alleged violation proximately caused David's injuries. The Parsons appeal this decision.

II. Assignments of Error

{¶10} The Parsons assign the following errors for our review:

> **Assignment of Error 1.** The lower court erred to the detriment of Plaintiffs by improperly granting Defendant's motion for summary judgment.
>
> **Assignment of Error 2.** The lower court erred to the detriment of Plaintiffs by not giving any consideration or weight to the City of Hillsboro, Ohio ordinance no. 96[.]16 in making its decision to grant appellee summary judgment.
>
> **Assignment of Error 3.** The lower court erred to the detriment of Plaintiffs by ignoring the evidence submitted on behalf of Plaintiffs, as permitted by Rule 56 of the Ohio Rules of Civil Procedure by determining that Plaintiffs had to prove, in response to a pending motion for summary judgment, what Plaintiff struck with his bicycle. In so doing, the lower court completely ignored Plaintiff's right to rely on inferences and presumptions given the state of the area in which he fell due to the Defendant's negligence in maintaining said area in view of Defendant's violation of City of Hillsboro, Ohio ordinance no. 96[.]16.

Because the Parsons's assignments of error present similar issues, we address them together.

III. Standard of Review

{¶11} When reviewing a trial court's decision on a motion for summary judgment motion, we conduct a de novo review. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336, 671 N.E.2d 241. Accordingly, we must independently review the record to determine whether summary judgment was appropriate and do not defer to the trial court's decision. *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d

704, 711, 622 N.E.2d 1153. Summary judgment is appropriate when the movant has established: (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, with the evidence against that party being construed most strongly in its favor. *Bostic v. Connor* (1988), 37 Ohio St.3d 144, 146, 524 N.E.2d 881, citing *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66, 375 N.E.2d 46. See Civ.R. 56(C).

{¶12} The burden of showing that no genuine issue of material fact exists falls upon the party who moves for summary judgment. *Dresher v. Burt*, 75 Ohio St.3d 280, 294, 1996-Ohio-107, 662 N.E.2d 264. To meet its burden, the moving party must specifically refer to "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any," which affirmatively demonstrate that the non-moving party has no evidence to support the non-moving party's claims. Civ.R. 56(C); See, also, *Hansen v. Wal-Mart Stores, Inc.*, Ross App. No. 07CA2990, 2008-Ohio-2477, at ¶8. Once the movant supports the motion with appropriate evidentiary materials, the nonmoving party "may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E). "If the party does not so respond, summary judgment, if appropriate, shall be entered against the party." Id.

IV. Analysis

{¶13} To establish an action for negligence, a plaintiff must show that: "(1) the defendant owed the plaintiff a duty of care; (2) the defendant breached the duty of care;

and (3) as a direct and proximate result of the defendant's breach, the plaintiff suffered injury." *Hansen* at ¶9, citing *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.*, 81 Ohio St.3d 677, 680, 1998-Ohio-602, 693 N.E.2d 217; *Jeffers v. Olexo* (1989), 43 Ohio St.3d 140, 142, 539 N.E.2d 614; and *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St.3d 75, 472 N.E.2d 707. "Generally, if a defendant points to evidence showing that the plaintiff cannot prove any one of the foregoing elements, and if the plaintiff fails to respond as Civ.R. 56 provides, the defendant is entitled to summary judgment." Id. (citations omitted).

{¶14} In their first and third assignments of error, the Parsons argue that genuine issues of material fact remain regarding whether Braman breached a duty to David and proximately caused his injuries because they produced (1) direct evidence of Braman's negligence; or (2) evidence from which the trial court could infer his negligence. However, they fail to enunciate precisely what duty they claim Braman owed David.

{¶15} Here, the trial court did not state with specificity what duty Braman owed to David. Because the existence of a duty presents a question of law, *Mussivand v. David* (1989), 45 Ohio St.3d 314, 318, 544 N.E.2d 265, we conduct a de novo review of this issue. *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm* (1995), 73 Ohio St.3d 107, 108, 652 N.E.2d 684.

{¶16} Braman characterizes this case as a premises liability action and classifies David as a licensee who he owed "no duty except to refrain from wantonly or willfully causing injury." But, it is unclear from the record whether Braman actually owned the sidewalk area in which David claims to have fallen. When asked at his deposition

whether he believed the area where David claimed the accident happened, i.e. "just coming off the street onto the sidewalk," was city property, Braman simply responded "Don't know." If Braman did not own this property, he owed David no duty under premises liability law. However, he could still have a duty to David under *Eichorn*, supra, and its progeny.

{¶17} In *Eichorn*, the Supreme Court of Ohio found that "[u]nless otherwise shown by evidence, a sidewalk on a public street is presumed to be within the limits of the public street and under the control of the municipality or public authority." Id. at 13. "Ordinarily, the duty to keep streets, including sidewalks, open, in repair and free from nuisance rests upon a municipality and not upon the abutting owners[,]" and "[o]wners of property abutting on a public street are not liable for injuries to pedestrians resulting from defects in such streets[.]" Id. (citations omitted). However, we recognize three exceptions to this rule:

> First, an abutting landowner will be liable for a pedestrian's injuries if a statute or ordinance imposes upon him a specific duty to keep a sidewalk adjoining his property in good repair. Second, the landowner will be liable if his affirmative acts created or negligently maintained the defective or dangerous condition causing the injury. Third, the landowner will be liable if he negligently permitted the defective or dangerous condition to exist in the abutting property for some private use or benefit.

Tackett v. Bell (Sept. 23, 1998), Jackson App. No. 97CA822, 1998 WL 670251, at *2, quoting *Lacy v. Mercy Hosp.* (Nov. 15, 1993), Scioto App. No. 2108, 1993 WL 481379, at *3 (citations omitted). Regardless of whether Braman or the city of Hillsboro owned this property, the trial court did not err in granting Braman a summary judgment.

A. Premises Liability Analysis

{¶18} If Braman owned the premises in question, we must apply premises

liability law. In premises liability cases, the duty landowners owe to those entering their property depends on the entrant's status as an invitee, licensee, or trespasser. *Gladon v. Greater Cleveland Regional Transit Auth.*, 75 Ohio St.3d 312, 315, 1996-Ohio-137, 662 N.E.2d 287. "Invitees are those persons who rightfully come upon the premises of another by invitation, express or implied, for some purpose which is beneficial to the owner." *Shotts v. Jackson Cty.*, Jackson App. No. 00CA016, 2000-Ohio-1961, 2000 WL 33226299, at *3, citing *Light v. Ohio Univ.* (1986), 28 Ohio St.3d 66, 68, 502 N.E.2d 611 and *Scheibel v. Lipton* (1951), 156 Ohio St. 308, 102 N.E.2d 453, paragraph one of the syllabus. They are entitled to the highest degree of care. *Hann v. Roush ex rel. Estate of Rice*, Washington App. No. 00CA55, 2001-Ohio-2614, 2001 WL 1396663, at *2. A landowner has a duty to use ordinary care to protect an invitee by maintaining the premises in a safe condition. *Light* at 68.

{¶19} Braman contends that David was a licensee on the premises. "Licensees are those who enter the premises of another, either by permission or acquiescence, for their own benefit or pleasure." *Shotts* at *3, citing *Light* at 68 and *Provencher v. Ohio Dept. of Transp.* (1990), 49 Ohio St.3d 265, 266, 551 N.E.2d 1257. Because the Parsons put forth no summary judgment evidence that David entered the premises where the accident occurred by Braman's invitation or for Braman's benefit, we agree that all the evidence indicates David at most was a licensee on the premises.

{¶20} A landowner has no duty to a licensee except to refrain from wanton or willful acts of misconduct and to warn of latent dangers on the property. Id., citing *Jeffers*, supra; *Scheurer v. Trustees of the Open Bible Church* (1963), 175 Ohio St. 163, 192 N.E.2d 38, paragraph two of the syllabus; and *Hannan v. Ehrlich* (1921), 102 Ohio

St. 176, 131 N.E. 504, syllabus. "Willful conduct 'involves an intent, purpose or design to injure.' Wanton conduct involves the failure to exercise 'any care whatsoever toward those to whom [one] owes a duty of care, and [this] failure occurs under the circumstances in which there is great probability that harm will result.'" *Gladon* at 319 (citations omitted).

{¶21} In their first and third assignments of error, the Parsons contend that genuine issues of fact remain for trial. However, they failed to produce any evidence that Braman had an intent, purpose or design to injure David. The Parsons attempt to argue that Braman "knew the sidewalk/curbside was dangerous" but exercised no care whatsoever toward David's safety and did nothing to warn him of this danger. They point to the following testimony from Braman's deposition:

> Q: In fact, that's a dangerous situation, isn't it, the way that pipe is exposed and jagged and down in a hole and covered, isn't it?
> A: Yes, sir.
>
> * * *
>
> Q: Did you call the city or any agency or division of the city to come out there and take a look at it?
> A: I have talked to city officials about the situation and the curb.

However, it is clear from Braman's testimony and photographs of the scene where David's wreck allegedly occurred that this hole and pipe were located on street, not Braman's property.

{¶22} Furthermore, the Parsons failed to establish what actually caused David's crash. David repeatedly acknowledged during his deposition that he did not know what object he allegedly struck that caused him to wreck his bicycle. Initially he called the object a rock. Then he testified "I don't know what it was, a piece of the concrete

maybe, I don't know." Although he later testified that he struck the sidewalk, he clarified that he only thought what he hit was part of the sidewalk. When questioned as to whether the object was attached to the sidewalk or was a loose piece of some type of object, David admitted "I do not know, I don't know, I don't remember." Even if we ignore this testimony and assume, as the Parsons argue, that David hit some part of the sidewalk before he crashed, the Parsons offer no evidence that the sidewalk was in a dangerous condition or that Braman knew of this danger but failed to warn David of it. Therefore, under a premises liability analysis, no genuine issue of material fact exists as to whether Braman breached a duty of care owed to David, and we overrule the Parsons's first and third assignments of error.

B. *Eichorn* Analysis

{¶23} If the city of Hillsboro owned the premises in question, we must determine if Braman can be held liable for David's injuries based on one of the three exceptions to the *Eichorn* rule we identified in *Tackett*, supra. In their second assignment of error, the Parsons contend that the first exception applies, i.e. a statute or ordinance imposes a specific duty on Braman to keep the sidewalk abutting his property in good repair. Hillsboro City Ordinance Section 96.16(A) provides: "All owners or agents of owners with property abutting or fronting upon any plaza, street, or alley within the corporate limits of the city are required to keep the public sidewalks, park area, and curbs abutting their property in good order and repair, and free from nuisance."

{¶24} The clear language of the ordinance "does not in and of itself impose civil liability upon an abutting property owner to a private individual injured upon the sidewalk." See *Lacy* at *3. Furthermore:

> City ordinances, like the one here, are often construed to impose only a duty to assist the municipality in its responsibility to maintain the public sidewalks. This, however, does not extend to imposing a duty on owners and occupiers of abutting properties to the public at large. Further, as a matter of public policy, such statutes are not meant to be used by injured pedestrians to impose potential liability on such property owners.

Id. (citations omitted). Therefore, we find that as a matter of law, Hillsboro City Ordinance Section 96.16(A) does not impose a duty on Braman to keep the sidewalk abutting his property in good repair for David's benefit. Therefore, we overrule the Parsons's second assignment of error.

{¶25} Again, in their first and third assignments of error, the Parsons contend that genuine issues of fact remain for trial. They must show either that Braman's "affirmative acts created or negligently maintained the defective or dangerous condition causing [David's] injury" or that Braman "negligently permitted the defective or dangerous condition to exist in the abutting property for some private use or benefit." See *Tackett* at *2. But again, the Parsons failed to establish what actually caused David's crash. Even if we assume that David hit some part of the sidewalk before he crashed, the Parsons still presented no evidence that the sidewalk was in a defective or dangerous condition, let alone that Braman created that condition or negligently permitted it to exist. Even if we assume that David hit the hole and exposed pipe on the roadway, the Parsons presented no evidence that (1) Braman's affirmative acts were somehow responsible for that condition, or (2) Braman negligently permitted the condition to exist so he could use or benefit from it. Therefore, under *Eichorn* and its progeny, no genuine issue of material fact exists as to whether Braman breached a duty of care owed to David, and we overrule the Parsons's first and third assignments of error.

{¶26} Having overruled each of the assignments of error, we affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellants shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Highland County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Abele, J. & McFarland, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.