[Cite as *Westfall v. Lemon*, 2015-Ohio-384.]

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

CANDY WESTFALL, et al.,	:	
	:	Case No. 14CA12
Plaintiffs-Appellants,	:	
	:	
vs.	:	DECISION AND JUDGMENT
	:	ENTRY
MARK LEMON, et al.,	:	
	:	
Defendants-Appellees.	:	**Released: 01/27/15**

APPEARANCES:

Sanford A. Meizlish, Barkan Meizlish Handelman Goodin DeRose Wentz, LLP, Columbus, Ohio, for Appellants.

Joseph A. Butauski, Caborn & Butauski Co., LPA, Dublin, Ohio, for Appellees.

McFarland, A.J.

{¶1} This is an appeal by Candy and Travis Westfall on behalf of their minor son, Joshua Westfall (hereinafter Appellant), of the trial court's summary judgment decision granted in favor of Appellees, Mark Lemon (hereinafter Appellee), and his employer, Matheny Motor Truck Company. On appeal, Appellants raise one assignment of error, contending that the trial court erred by entering summary judgment in favor Appellees when the record, construed in accordance with Civ.R. 56, reveals genuine issues of material fact and, as such, Appellees are not entitled to judgment as a matter

of law. Because we conclude that Appellant's own actions were the proximate cause of his injuries and that even if Appellee was negligent in the operation of his vehicle, his negligence did not exceed the negligence of Appellant, we cannot conclude that the trial court erred in granting judgment, as a matter of law, in favor of Appellees. As such, Appellants' sole assignment of error is overruled. Accordingly, the trial court's grant of summary judgment in favor of Appellees is affirmed.

FACTS

{¶2} On August 19, 2010, Appellant, Joshua Westfall, age 14, was driving an all-terrain vehicle (ATV) across State Route 7 in Washington County as he was engaged in farming activities in connection with his family's farm store known as Hensler's Town and Country Market. Upon crossing the road from the west heading in an east-bound direction, Appellant was struck by a van driven by Appellee, Mark Lemon, and owned by Lemon's employer, Matheny Motor Truck Company, which was traveling in the northbound lane. The record indicates another vehicle was traveling in the southbound lane at the time, but was not involved in the collision. Appellant sustained serious injuries and has no memory of the event.

{¶3} On August 16, 2012, Appellant's parents, Travis and Candy Westfall, filed a complaint on behalf of their minor son, Joshua, alleging negligence on the part of Appellant and his employer, which primarily claimed that Appellant failed to maintain an appropriate level of speed and control over his vehicle and thereby caused the collision. Appellees responded by denying the allegations contained in the complaint and alleging that Appellant's own negligence was the cause of his injuries. The matter then proceeded through the discovery process and depositions were taken of Travis, Candy and Joshua Westfall, Mark Lemon and Steven Belyus, Appellants' expert witness.

{¶4} Pertinent portions of these depositions will be discussed more fully below, however, it was the opinion of Belyus that Appellee was traveling between 62 and 72 m.p.h. in an area that had a posted speed limit of 55 m.p.h. Appellee testified that he was traveling at or below the posted speed limit and Appellees' expert opined, based upon his review of the "black box" contained in the van in which Appellee was driving, that Appellee was driving approximately 53 m.p.h. just prior to impact. The record is clear that Appellant had a sight line of the northbound lane of approximately 675 feet, however, according to Appellant's own expert, Appellant pulled into Appellee's lane of travel when Appellee was about

200 feet and two seconds away. Appellants' expert further conceded that Appellee reacted appropriately when confronted with the sudden entry of Appellant into his path, by braking and swerving to miss Appellant.

{¶5} Appellees moved for summary judgment on July 31, 2013, essentially claiming that Appellee had a preferential right-of-way and that Appellant failed to yield that right-of-way, thereby causing the accident. Thus, Appellees argued Lemon was not negligent and that Appellant's injuries were solely caused by his own actions. Appellants filed a memorandum contra arguing that Appellee lost his preferential right-of-way when he operated his vehicle above the speed limit. Appellants further contended that questions regarding right-of-way, failure to yield and proximate cause precluded summary judgment. Over the objection of Appellants, the trial court granted summary judgment in favor of Appellees.

{¶6} In its decision, the trial court construed the evidence in favor of Appellants with regard to Appellee's vehicle speed and assumed arguendo Appellee was speeding. Even construing the evidence in a light most favorable to Appellants, the trial court determined that Appellant's negligence in failing to yield was the proximate cause of his injuries and that under comparative negligence principles, Appellants were barred from recovery, as no reasonable person could conclude that Appellee's negligence

exceeded Appellant's own negligence. It is from this decision that Appellants now bring their timely appeal, setting forth one assignment of error for our review.

ASSIGNMENT OF ERROR

"I. THE TRIAL COURT ERRED BY ENTERING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS-APPELLEES WHEN (1) THE RECORD, WHEN CONSTRUED IN ACCORDANCE WITH CIV.R. 56, REVEALS GENUINE ISSUES OF MATERIAL FACT; AND (2) THE DEFENDANT-APPELLEE IS NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW."

LEGAL ANALYSIS

{¶7} On appeal, Appellants challenge the decision of the trial court granting summary judgment in favor of Appellees, claiming the existence of genuine issues of material fact with respect to issues of vehicle speed, right of way, proximate cause and comparative negligence, which should have precluded summary judgment. A review of the record reveals that the trial court applied comparative negligence principles to determine that Appellant's negligence exceeded the negligence of Appellee, and, as such, Appellant was barred from recovery. Having made that determination, the trial court determined Appellee was entitled to judgment, as a matter of law.

{¶8} We review the trial court's decision on a motion for summary judgment de novo. *Smith v. McBride*, 130 Ohio St.3d 51, 2011-Ohio-4674, 955 N.E.2d 954, ¶ 12. "Accordingly, we afford no deference to the trial

court's decision and independently review the record to determine whether summary judgment is appropriate." *Snyder v. Stevens*, 4th Dist. Scioto No. 12CA3465, 2012-Ohio-4120, ¶ 11.

{¶9} Under Civ.R. 56(C), summary judgment is appropriate only if " '(1) no genuine issue of any material fact remains, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and construing the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made.' " *DIRECTV, Inc. v. Levin*, 128 Ohio St.3d 68, 2010-Ohio-6279, 941 N.E.2d 1187, ¶ 15; quoting *State ex rel. Duncan v. Mentor City Council*, 105 Ohio St.3d 372, 2005-Ohio-2163, 826 N.E.2d 832, ¶ 9.

{¶10} "[A] party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, bears the initial burden of informing the trial 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 on the essential element(s) of the nonmoving party's claims." *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). To meet this burden, the moving party must be able to specifically point to the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of

evidence, and written stipulations of fact, if any, timely filed in the action, which affirmatively demonstrate that the nonmoving party has no evidence to support the nonmoving party's claims. Id.; Civ.R. 56(C).

{¶11} "If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. However, if the moving party has satisfied its initial burden, the nonmoving party then has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial * * *." *Dresher* at 293.

{¶12} The substantive law determines whether a genuine issue of material fact remains. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505 (1986); *Turner v. Turner*, 67 Ohio St.3d 337, 340, 617 N.E.2d 1123 (1993); *Perez v. Scripps-Howard Broadcasting Co.*, 35 Ohio St.3d 215, 218-19, 520 N.E.2d 198 (1988). As the court stated in *Anderson*, supra:

> "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted."

In the case sub judice, to determine whether genuine issues of material fact remain disputed, we must examine the law of negligence and comparative negligence.

{¶13} Negligence occurs when the defendant fails to recognize that he owes a duty to protect the plaintiff from harm and that failure proximately resulted in injury or damage to the plaintiff. *Di Gildo v. Caponi*, 18 Ohio St.2d 125, 127, 247 N.E.2d 732 (1969); *Kauffman v. First-Central Trust Co.*, 151 Ohio St. 298, 306, 85 N.E.2d 796 (1949). " 'Negligence in motor vehicle cases, as in negligence cases generally, is the failure to exercise ordinary care so as to avoid injury to others. Ordinary care is that degree of care which persons of ordinary care and prudence are accustomed to observe under the same or similar circumstances, and the degree of care required of a motorist is always controlled by and depends upon the place, circumstances, conditions, and surroundings.' " *Sickles v. Jackson Cty. Hwy. Dept.*, 196 Ohio App.3d 703, 2011-Ohio-6102, 965 N.E.2d 330; quoting *McDonald v. Lanius*, 3rd Dist. Marion No. 9-93-23, 1993 WL 451201, *2 (Oct. 28, 1993); quoting 7 Ohio Jurisprudence 3d (1978) 483-484, Automobiles and Other Vehicles, Section 312.

{¶14} The elements of a claim of negligence are: (1) the existence of a legal duty owing from the defendant to the plaintiff; (2) the defendant's

breach of that duty; and (3) injury to the plaintiff proximately resulting from such failure. *Wallace v. Ohio Dept. of Commerce*, 96 Ohio St.3d 266, 2002-Ohio-4210, 773 N.E.2d 1018, ¶ 22; citing *Mussivand v. David*, 45 Ohio St.3d 314, 318, 544 N.E.2d 265 (1989). To recover, a plaintiff must also prove damages proximately resulting from the breach. *Horsley v. Essman*, 145 Ohio App.3d 438, 442, 763 N.E.2d 245; citing *Jeffers v. Olexo*, 43 Ohio St.3d 140, 142, 539 N.E.2d 614 (1989).

{¶15} In order to survive a properly supported motion for summary judgment in a negligence action, a plaintiff must establish that genuine issues of material fact remain as to whether: (1) the defendant owed him 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. See *Texler v. D.O. Summers Cleaners*, 81 Ohio St.3d 677, 680, 693 N.E.2d 271 (1998); *Jeffers v. Olexo*, supra, at 142; *Menifee v. Ohio Welding Products, Inc.*, 15 Ohio St.3d 75, 472 N.E.2d 707 (1984). If a defendant points to evidence illustrating that the plaintiff will be unable to prove any one of the foregoing elements, the defendant is entitled to judgment as a matter of law. See *Feichtner v. Cleveland*, 95 Ohio App.3d 388, 394, 642 N.E.2d 657 (1994); *Keister v. Park Centre Lanes*, 3 Ohio App.3d 19, 443 N.E.2d 532 (1981).

{¶16} The existence and conditions of a duty between two parties is determined by the nature of the relationship between them. *Wallace* at ¶ 23; citing *Commerce & Industry Ins. Co. v. Toledo,* 45 Ohio St.3d 96, 98, 543 N.E.2d 1188 (1989). The duty element of negligence poses a question of law for the court to determine. Id. at ¶ 22. "[T]he existence of a duty depends upon the foreseeability of harm: if a reasonably prudent person would have anticipated that an injury was likely to result from a particular act, the court could find that the duty element of negligence is satisfied." Id. at ¶ 23; citing *Texler v. D.O. Summers Cleaners & Shirt Laundry Co*., supra, at 680; *Commerce*, supra, at 98; *Menifee,* supra, at 77. Duty has also been described as "the court's 'expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.' " *Wallace*, supra, at ¶ 24; quoting Prosser, Law of Torts (4th ed.1971), 325-326. Thus, there is no explicit formula for determining whether a duty exists and the existence of a duty is largely dependent upon the facts and circumstances present. See *Payne v. Vance,* 103 Ohio St. 59, 67, 133 N.E. 85 (1921).

{¶17} As this Court has previously noted:

" 'Under Ohio law, the driver of a motor vehicle proceeding over a through street in a lawful manner has the absolute right

> of way over a vehicle on an intersecting stop street, and the driver on the through street may ordinarily assume that such right of way will be respected and observed by the driver of the vehicle on the intersecting stop street.' " *Earles v. Smith*, 4th Dist. Lawrence No. 99CA28, 2000 WL 977896, *4; quoting *Timmons v. Russomano,* 14 Ohio St.2d 124, 236 N.E.2d 665 (1968), paragraph one of the syllabus; See, also, *Parton v. Weilnau,* 169 Ohio St. 145, 156, 158 N.E.2d 719, 727 (1959).

However, when a vehicle is not proceeding in a lawful manner, the driver of the vehicle loses the right of way.[1] *Earles* at *4; citing *Morris v. Bloomgren*, 127 Ohio St. 147, 187 N.E.2d 2, paragraph three of the syllabus (1933) (stating that when a vehicle " 'is not proceeding in a lawful manner in approaching or crossing the intersection * * * such vehicle loses its preferential status' "). " '[T]he law gives to the operator of a vehicle on the highway who has the right of way a shield, an absolute right to proceed uninterruptedly, but he forfeits the shield if he fails to proceed in a lawful manner.' " *Earles* at *4; quoting *Vavrina v. Greczanik*, 40 Ohio App.2d 129,

[1] R.C. 4511.01 defines right of way in pertinent part as follows: "(UU) 'Right-of-way' means either of the following, as the context requires: (1) The right of a vehicle, streetcar, trackless trolley, or pedestrian to proceed uninterruptedly in a lawful manner in the direction in which it or the individual is moving in preference to another vehicle, streetcar, trackless trolley, or pedestrian approaching from a different direction into its or the individual's path[.]"

135, 318 N.E.2d 408 (1974); citing *Beers v. Wills*, 172 Ohio St. 569, 571, 179 N.E.2d 57 (1962).

{¶18} Further, although motorists have a duty to look out for the other motorists, motorists " 'may rightfully assume the observance of the law and the exercise of ordinary care by others, and action by him in accordance with such assumption in the absence of notice or knowledge to the contrary is not negligence.' " *Earles* at *4 (internal citations omitted). It is important to note at this juncture that Appellant is alleged to have failed to yield. His own expert testified that, in addition to the speed of Appellee's vehicle, "failure on the part of the juvenile operating the four wheeler to yield the right-of-way[]" was the cause of the accident. R.C. 4511.44 governs the entering of a roadway from any place other than another roadway and the duty to yield when doing so and provides, in pertinent part, as follows:

> "(A) The operator of a vehicle, streetcar, or trackless trolley about to enter or cross a highway from any place other than another roadway shall yield the right of way to all traffic approaching on the roadway to be entered or crossed."

{¶19} Here, there was conflicting testimony regarding the speed in which Appellee was operating his vehicle leading up to the collision at issue. Appellee maintains that he was traveling within the posted speed limit of 55

m.p.h. Appellees' expert opined, based upon his review of the "black box" contained in Appellees' vehicle, Appellee was traveling at or even just below 55 m.p.h. Appellant has no memory of the events on the day of the collision and could not testify regarding the speed of Appellees' vehicle. Appellants' expert opined that Appellee, based upon evidence gathered at the crash scene, was traveling between 62 and 72 m.p.h. Thus, a question of fact exists with respect to whether Appellee was proceeding lawfully in his lane of travel, or whether he was, in fact, speeding and thereby forfeited his right-of-way. Appellant contends that the existence of this question of fact should have precluded a grant of summary judgment in Appellee's favor.

{¶20} However, as set forth above, construing the evidence in favor of Appellant, as the non-moving party, and assuming arguendo that Appellee was speeding and therefore breached a duty owed to Appellant, issues of comparative negligence come into play in this case as we reach the proximate cause portion of the negligence analysis. R.C. 2315.33 is Ohio's comparative negligence statute and it provides as follows:

> "The contributory fault of a person does not bar the person as plaintiff from recovering damages that have directly and proximately resulted from the tortious conduct of one or more other persons, if the contributory fault of the plaintiff was not

> greater than the combined tortious conduct of all other persons from whom the plaintiff seeks recovery in this action and of all other persons from whom the plaintiff does not seek recovery in this action. The court shall diminish any compensatory damages recoverable by the plaintiff by an amount that is proportionately equal to the percentage of tortious conduct of the plaintiff as determined pursuant to section 2315.34 of the Revised Code."

{¶21} Again, assuming for purposes of argument that genuine issues of material fact remain regarding the duty and breach elements, we believe that no genuine issues of material fact exist regarding the proximate cause element. As we explain below, reasonable minds could only conclude that Appellant's negligence in failing to protect himself against a known risk, specifically, failing to yield to an oncoming vehicle while crossing a public roadway from one driveway to another driveway, and instead driving his ATV right into its path far exceeded Appellee's negligence. Thus, even if Appellee was negligent, under comparative negligence principles applied to the facts in the case sub judice, Appellant cannot recover.

{¶22} "The rule of proximate cause 'requires that the injury sustained shall be the natural and probable consequence of the negligence alleged; that

is, such consequence as under the surrounding circumstances of the particular case might, and should have been foreseen or anticipated by the wrongdoer as likely to follow his negligent act.' " *Jeffers v. Olexo*, 43 Ohio St.3d 140, 143, 539 N.E.2d 614 (1989); quoting *Ross v. Nutt*, 177 Ohio St. 113, 203 N.E. 118 (1964). "[I]n order to establish proximate cause, foreseeability must be found. * * * 'If an injury is the natural and probable consequence of a negligent act and it is such as should have been foreseen in the light of all the attending circumstances, the injury is then the proximate result of the negligence * * *.' " *Mussivand v. David*, 45 Ohio St.3d 314, 321, 544 N.E.2d 265 (1989); quoting *Mudrich v. Standard Oil Co*., 153 Ohio St. 31, 39, 90 N.E.2d 859 (1950). "The standard test for establishing causation is the sine qua non or 'but for' test. Thus, a defendant's conduct is a cause of the event (or harm) if the event (or harm) would not have occurred but for that conduct; conversely, the defendant's conduct is not the cause of the event (or harm) if the event (or harm) would have occurred regardless of the conduct. Prosser & Keeton, Law of Torts (5th Ed.1984) 266." *Anderson v. St. Francis–St. George Hosp., Inc*., 77 Ohio St.3d 82, 84-85, 671 N.E.2d 225 (1996). " '[L]egal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability.' " *Johnson v. Univ.*

Hosp. of Cleveland, 44 Ohio St.3d 49, 57, 540 N.E.2d 1370 (1989) quoting Prosser & Keeton, Law of Torts (5th Ed.1984) 264, Section 41; see, also, *Hester v. Dwivedi*, 89 Ohio St.3d 575, 733 N.E.2d 1161 (2000).

{¶23} Ordinarily, proximate cause is a question of fact for the jury. *Strother v. Hutchinson*, 67 Ohio St.2d 282, 288, 423 N.E.2d 467 (1981); citing *Clinger v. Duncan*, 166 Ohio St. 216, 141 N.E.2d 156 (1957). However, "where 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 jury [to decide], and, as a matter of law, judgment must be given for the defendant." *Kemerer v. Antwerp Bd. of Edn.*, 105 Ohio App.3d 792, 796, 664 N.E.2d 1380 (1995); quoting *Case v. Miami Chevrolet Co.*, 38 Ohio App. 41, 45-46, 175 N.E.2d 224 (1930); *Vermett v. Fred Christen & Sons Co.*, 138 Ohio App.3d 586, 612, 741 N.E.2d 954 (6th Dist.2000) ("While proximate cause is often a jury question, summary judgment is proper on this issue when appellant has failed to meet his burden to produce evidence to challenge unfavorable evidence already in the record."). Further, even if Appellee was negligent per se, in operating his vehicle at an unreasonable rate of speed, " '[n]egligence per se does not equal liability per se. Simply because the law may presume negligence from a person's violation of a statute * * * does not mean that the law presumes

that such negligence was the proximate cause of the harm inflicted.' " *Barnett v. Combs*, 4th Dist. Ross No. 1268, 1986 WL 15209, *3 (Dec. 29, 1986); quoting *Merchants Mutual Ins. Co. v. Baker*, 15 Ohio St.3d 316, 473 N.E.2d 827 (1984). This is especially applicable when, as here, Appellant can also be viewed as being negligent per se.

{¶24} Like the trial court, we do not believe that any reasonable person could conclude that Appellant's injuries proximately resulted from Appellee's alleged speeding. Rather, we find the proximate cause of Appellant's injuries to be his own negligence in pulling directly into the path of Appellant's vehicle. Of importance, although Appellant has no memory of the events relating to the collision, both he and his father, Travis, testified in their depositions that regardless of the speed of an oncoming vehicle, Joshua had been instructed not to try to cross the road when a vehicle was in view. For reasons which remain unknown, however, Joshua attempted to cross the road when Appellee's vehicle was only 200 feet and two seconds away. These facts are not disputed. Further, as stated by Appellant's own expert and as relied upon by the trial court, even if Appellee had been going the speed limit of 55 m.p.h., at the time Appellant entered into Appellee's lane of travel, Appellee had, at the most, two seconds to react. The testimony offered by Appellant's own expert indicates that Appellee reacted

appropriately given the time allotted by braking and swerving to miss Appellant.

{¶25} Additionally, Appellants' expert testified as follows with respect to the weaknesses in Appellants' case, as well as the contributing factors and proximate cause of the accident:

"Q: What did you think the cons were based on your initial scene inspection, whatever thought process you put to it after that point?

A: Well, the cons were the ATV pulled out into the path of a northbound vehicle.

Q: And he pulled out, based on your reconstruction, at a point that it presented an imminent hazard to himself, did he not?

A: Yes.

* * *

Q: You certainly would agree with me that this four wheeler entering the roadway would be considered a sudden or startling event to a driver?

A: Yes, sir.

* * *

Q: But I think you would agree he did react to this startling event within a reasonable time?

A: Yes, sir.

Q: And we got sidetracked a little bit. I'm saying he did – there is evidence he did take evasive action when he perceived this event, which would include steering right and braking, correct?

A: Yes, sir.

* * *

Q: Would you also agree with me there is no indication whatsoever that the minor did anything to try to avoid this accident?

A: I don't have any data.

Q: That's what I'm asking you. Is there any data, is there anything you uncovered in your entire investigation that would lead you to believe the minor did anything to try to avoid this accident?

A: No, sir.

Q: And in fact, does it not look almost like the minor drove right into the front corner of Mr. Lemon's van?

A: That is what happened.

* * *

Q: * * * Assuming he was going 72 miles an hour, does that mean essentially the minor pulled out about two seconds after – or two seconds before the accident and after this vehicle would have been in his line of sight for approximately 4.3 seconds?

A: That's approximately correct.

* * *

Q: Let's get back to your expertise then. Would you certainly agree had the minor looked to his right at whatever speed Mr. Lemon was traveling, he had the ability to see him before he started across State route 7?

A: Yes, sir.

Q: And would you also agree whether Mr. Lemon was traveling at 72 miles an hour or 62 miles an hour or 55 miles an hour, the minor did not start that movement across the road at the point Mr. Lemon just got into his line of sight?

A: True.

Q: Give or take, the minor did not start that movement across the road until Mr. Lemon was about two seconds away from the point of impact?

A: Somewhere in that neighborhood."

Based upon these facts, we cannot conclude that any alleged speeding by Appellee was the proximate cause of Appellant's injuries. As such, we find this case to fall under the uncommon scenario in which it was appropriate for the trial court to determine the issue of proximate cause as a matter of law, rather than submitting it to the jury.

{¶26} Further, under Ohio's comparative negligence statute, the fact finder apportions the percentage of each party's negligence that proximately caused the plaintiff's damages. R.C. 2315.33. A plaintiff may recover where his contributory negligence is equal to or less than the combined negligence of all the defendants. R.C. 2315.33; *Deem v. Columbus Southern Power Co*., 4th Dist. Meigs No. 07CA6, 2007-Ohio-4404, ¶ 11 (citing former R.C. 2315.19).

{¶27} Generally, issues of comparative negligence are for the jury to determine unless the evidence is so compelling that reasonable minds can reach but one conclusion. Id. at ¶ 12. While issues of contributory and comparative negligence are typically determined by the trier of fact, " ‘ "summary judgment may be appropriate under the comparative negligence statute where, after construing the evidence most strongly in plaintiff's favor, a reasonable person could only conclude that plaintiff's negligence was greater than the negligence of defendant." ’ " Id.; quoting

Scassa v. Dye, 7th Dist. Carroll No. 02CA779, 2003-Ohio-3480, ¶ 72; quoting *Collier v. Northland Swim Club*, 35 Ohio App.3d 35, 39, 518 N.E.2d 1226 (1987). As such, a trial court may grant a defendant summary judgment when the court determines, as a matter of law, that the plaintiff's own negligence outweighed any negligence of the defendant. *Deem* at ¶ 12; citing *Gross v. Werling*, 3rd Dist. Auglaize No. 2-99-06, 1999 WL 1015072 (Sept. 30, 1999).

{¶28} As this Court explained in *Earles v. Smith*, supra, at * 5:

> "[W]eighing the respective negligence of a plaintiff and a defendant is a difficult task and should generally be within the province of a jury. However, if a defendant is not negligent or if the plaintiff's negligence clearly outweighs any negligence of the defendant (i.e. the situation we have here before us in the case sub judice), the granting of a summary judgment is entirely appropriate."

{¶29} In *Deem*, supra, we noted that contributory negligence has been defined as " 'any want of ordinary care on the part of the person injured, which combined and concurred with the defendant's negligence and contributed to the injury as a proximate cause thereof, and as an element without which the injury would not have occurred.' " *Deem* at ¶ 13; quoting

Brinkmoeller v. Wilson, 41 Ohio St.2d 223, 226, 325 N.E.2d 233 (1975). "[O]ne who has knowledge of a dangerous situation may not disregard it and, if he does so, is chargeable with contributory negligence." *Jacques v. Dayton Power & Light Co.*, 80 Ohio App. 258, 267, 74 N.E.2d 211 (1947).

{¶30} Here, as we have discussed, Appellant drove his ATV across a public roadway into the path of an oncoming vehicle at a point in which the oncoming vehicle was merely two hundred feet and two seconds away. Although Appellee may have been speeding, and even assuming he was, Appellant's own expert testified that Lemon responded appropriately given the time he had to react to the situation and that Appellant's own actions created an imminent hazard to himself. In light of the foregoing we believe that the evidence reveals that Appellant's negligence far outweighs any negligence on Appellee's part. Thus, reasonable minds can only conclude that Appellant's negligence was greater than Appellee's negligence. Because, as a matter of law, Appellant's contributory negligence exceeds any negligence on Appellee's part, Appellant may not recover. Again, even if we assume that genuine issues of material fact remain regarding whether Appellee owed Appellant a duty and breached that duty, no genuine issues of material fact remain regarding proximate cause and Appellant's contributory negligence. Therefore, the trial court properly granted summary

judgment in favor of Appellee. Accordingly, based upon the foregoing reasons, we overrule Appellant's sole assignment of error.

JUDGMENT AFFIRMED.

Harsha, J., concurring.

{¶31} I concur in judgment and opinion with the exception that I conclude that determining the existence of a duty is always a question of law for the court to decide, notwithstanding the need to consider facts in making that determination. *See Martin v. Lambert*, 2014-Ohio-715, 8 N.E.3d 1024, ¶ 17 (4th Dist.), citing *Grover v. Eli Lilly & Co.*, 63 Ohio St.3d 756, 762, 591 N.E.2d 696 (1992) ("The existence of a duty is a question of law for a court to decide, even if resolving that question requires the court to consider the facts or evidence").

{¶32} In all other regards, I concur in judgment and opinion.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and that the Appellees recover of Appellants any costs herein.

The Court finds there were reasonable grounds for this appeal.

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

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

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

Hoover, P.J.: Concurs in Judgment and Opinion.
Harsha, J.: Concurs with Concurring Opinion.

For the Court,

BY: _____
Matthew W. McFarland,
Administrative 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.