[Cite as *Battista v. Bucceri*, 2014-Ohio-4437.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

THERESA A. BATTISTA, ET AL.	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiffs-Appellants	:	Hon. Sheila G. Farmer, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	
FRANK A. BUCCERI, ET AL.	:	Case No. 2014CA00027
	:	
Defendants-Appellees	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. 2013CV01184
JUDGMENT:	Affirmed
DATE OF JUDGMENT:	September 29, 2014

APPEARANCES:

For Plaintiffs-Appellants	For Defendants-Appellees
DAVID B. SPALDING 157 Wilbur Drive, NE North Canton, OH 44720	JOSEPH K. OLDHAM 759 West Market Street Akron, OH 44303

Farmer, J.

{¶1} On February 22, 2013, appellant, Theresa Battista, was operating a motor vehicle southbound on Miday Avenue in Osnaburg Township when she slid on black ice and left the roadway, striking a mailbox on the property of appellees, Frank and Jean Bucceri. Appellant sustained injuries.

{¶2} On April 30, 2013, appellant, together with the owner of the vehicle, Gerald Bennett, filed a complaint against appellees for negligence in their construction of their mailbox within the right-of-way.

{¶3} On November 21, 2013, appellants filed a motion for partial summary judgment, seeking a determination that appellees owed a duty to the traveling public regarding the construction and placement of their mailbox. On December 9, 2013, appellees filed a response and cross-motion for summary judgment, arguing the issues of duty and proximate cause. By judgment entry filed January 31, 2014, the trial court found in favor of appellees, finding appellant's negligence was the proximate cause of the accident, and she was a trespasser on appellee's property as the mailbox was located on their property.

{¶4} Appellants filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶5} "THE TRIAL COURT ERRED IN HOLDING THAT DEFENDANTS-APPELLEES OWED NO DUTY TO PLAINTIFFS-APPELLANTS ON THE BASIS THAT APPELLANT, THERESA BATTISTA, WAS A TRESPASSER ON THE DEFENDANT'S PROPERTY."

II

{¶6} "BASED ON THE EVIDENCE AND FACTS PRESENTED, THE TRIAL COURT ERRED IN HOLDING THAT THE APPELLEES OWED NO DUTY TO THE TRAVELING PUBLIC, INCLUDING THE APPELLANTS HEREIN, WITH REGARD TO THE CONSTRUCTION AND PLACEMENT OF THE CONCRETE BLOCK AND BRICK MAILBOX WITHIN THE PUBLIC RIGHT-OF-WAY AND ONE FOOT FROM THE EDGE OF THE ROAD."

I, II

{¶7} Appellants claim the trial court erred in granting summary judgment to appellees as appellees owed a duty to the traveling public regarding the construction of their mailbox. In addition, the trial court erred in finding appellant was a trespasser. We disagree.

{¶8} Summary Judgment motions are to be resolved in light of the dictates of Civ.R. 56. Said rule was reaffirmed by the Supreme Court of Ohio in *State ex rel. Zimmerman v. Tompkins,* 75 Ohio St.3d 447, 448, 1996-Ohio-211:

> Civ.R. 56(C) provides that before summary judgment may be granted, it must be determined that (1) no genuine issue as to any material fact remains to be litigated, (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 viewing such 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. *State ex. rel. Parsons v. Fleming* (1994), 68 Ohio St.3d 509, 511, 628 N.E.2d 1377, 1379, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 4 O.O3d 466, 472, 364 N.E.2d 267, 274.

{¶9} As an appellate court reviewing summary judgment motions, we must stand in the shoes of the trial court and review summary judgments on the same standard and evidence as the trial court. *Smiddy v. The Wedding Party, Inc.,* 30 Ohio St.3d 35 (1987).

{¶10} In its decision filed January 31, 2014, the trial court determined the following:

> The Court finds that, as a matter of law, Plaintiff Teresa Battista was negligent and that this negligence was the proximate cause of the accident at issue in the case. The Court also finds that Plaintiff was a trespasser on Defendants' land and that because there is no evidence that Defendants engaged in willful or wanton misconduct toward Plaintiffs, Defendants are entitled to summary judgment.

{¶11} In considering the facts most favorably for appellants under the summary judgment standard, we find the following:

1) Appellant was driving southbound on Miday Avenue, a township road, at a speed of 30 m.p.h. T. Battista aff. at ¶ 4 and 7; F. Bucceri depo. at 13.

2) The vehicle came upon a section of the roadway where the rain had turned to ice. T. Battista aff. at ¶ 3 and 6.

3) The vehicle slid on the roadway, came across the northbound lane of travel, and struck appellees' mailbox. *Id*. at ¶ 4.

4) Appellees' mailbox is surrounded by bricks and was erected some 20 years ago. F. Bucceri depo. at 11-12; Plaintiff's Exhibit B.

5) The mailbox is approximately 4 feet wide, 30 inches deep, and 5½ feet high. *Id*. at 12.

6) Appellants' expert, Ronald Eck, P.E., Ph.D., opined to a reasonable degree of engineering certainty that appellees' mailbox was "an unreasonable roadside hazard and created a substantial risk of serious injury." Assessment of Roadside Safety at page 8, attached to the October 10, 2013 Eck aff. as Exhibit B-2.

7) Dr. Eck stated due to the size and rigidity of the mailbox structure, it "clearly does not comply with either the technical requirements or the intent of the Postal Service guidance on mail boxes and represented a hazardous roadside condition. It does not comply with the AASHTO Roadside Design Guide (2011) and is unsafe. *Id.* at page 7.

8) The mailbox is on appellees' property and is "18 inches off of the traveled way, i.e., the paved portion of the roadway, and 12 inches off the approximately 6-inch wide stone shoulder adjacent to the pavement." *Id.* at pages 5-6.

9) The roadway width in question is approximately 19 feet with no pavement markings. There are no lines in the center or berm lines. *Id.* at page 1; F. Bucceri depo. at 13.

10) There are no statutory or township restrictions relative to the erection of mailboxes. Butcher depo. at 42.

{¶12} The genesis of this appeal is a motion for partial summary judgment filed by appellants on November 21, 2013. The motion requested a finding that appellees owed a duty to motorists traveling on Miday Avenue regarding the constriction and placement of their mailbox. In support of their motion, appellants submitted various exhibits, including the affidavits of appellant Theresa Battista and Dr. Eck, along with his Assessment of Roadside Safety.

{¶13} In response, appellees filed a response and cross-motion for summary judgment on December 9, 2013, arguing the issues of duty and proximate cause. In their reply filed December 26, 2013, appellants addressed the issue of proximate cause. It was suggested at oral argument that proximate cause was not a subject of the motions; however, both parties addressed and argued proximate cause to the trial court.

{¶14} In order to establish negligence, a plaintiff must show a duty owed, a breach of that duty, and an injury proximately caused from the breach. *Strother v. Hutchinson,* 67 Ohio St.2d 282 (1981). Appellants argued appellees owed a duty to any passing motorist not to create an obstruction and/or hazard to a passing motorist.

{¶15} The tremendous trifle to appellants' position is that the mailbox was not on any part of the travel portion of the roadway, and was not the cause of appellant's loss of control and skidding off the roadway.

{¶16} "Duty" is defined by the relationship of the parties. *Commerce & Industry Insurance Co. v. Toledo,* 45 Ohio St.3d 96 (1989). In cases of premises liability, "Ohio adheres to the common-law classifications of invitee, licensee, and trespasser." *Gladon v. Greater Cleveland Regional Transit Authority,* 75 Ohio St.3d 312, 315, 1996-Ohio-137. "Invitees are persons who rightfully come upon the premises of another by invitation, express or implied, for some purpose which is beneficial to the owner." *Id.* "[A] person who enters the premises of another by permission or acquiescence, for his *own* pleasure or benefit, and not by invitation, is a licensee." *Light v. Ohio University,* 28 Ohio St.3d 66, 68 (1986). "A trespasser is one who, without express or implied authorization, invitation or inducement, enters private premises purely for his own purposes or convenience." *McKinney v. Hartz & Restle Realtors, Inc.,* 31 Ohio St.3d 244, 246 (1987).

{¶17} The only relationship available to a landowner and a traveling motorist on the roadway is that of a trespasser. There is no expressed or implied relationship between the parties. Appellees were free to assume that no one would hit their mailbox or cross through their property. "[A] landowner owes no duty to a***trespasser except to refrain from willful, wanton or reckless conduct which is likely to injure him." *Gladon* at 317. As found by the trial court, there is no evidence that appellees engaged in willful, wanton or reckless conduct toward appellant.

{¶18} Appellants appear to argue a heightened duty is established because the mailbox was within the "right-of-way." In support, appellants cite the case of *The Cambridge Home Telephone Co. v. Harrington,* 127 Ohio St. 1 (1933), wherein the Supreme Court of Ohio held at paragraph one of the syllabus: "The traveling public has

a right to the use of a public highway, to the entire width of the right of way, as against all other persons using such highway for private purposes."

{¶19} R.C. 4511.33 governs rules for driving in marked lanes. Subsection (A)(1) states the following:

> (A) Whenever any roadway has been divided into two or more clearly marked lanes for traffic, or wherever within municipal corporations traffic is lawfully moving in two or more substantially continuous lines in the same direction, the following rules apply:
>
> (1) A vehicle or trackless trolley shall be driven, as nearly as is practicable, entirely within a single lane or line of traffic and shall not be moved from such lane or line until the driver has first ascertained that such movement can be made with safety.

{¶20} A motorist's right of travel does not include the undeveloped right-of-way adjacent to the roadway.

{¶21} Regardless of the determination on duty, it can never be established that the mailbox was the proximate cause of appellant's injuries. "The 'proximate cause' of a result is that which in a natural and continued sequence contributes to produce the result, without which it would not have happened." *Piqua v. Morris,* 98 Ohio St. 42 (1918), paragraph one of the syllabus.

{¶22} In *Sweitzer v. Houtman,* 5th Dist. Delaware No. 98CA-E-11-058, 1999 WL 172891 (Feb. 18, 1999), this court determined the position of a mailbox in the right-of-

way was not the proximate cause of the accident and injury. As in the matter sub judice, the probable cause was appellant's failure to control her vehicle on an icy roadway.

{¶23} Appellant rebuts this proximate cause and foreseeability issue by arguing two telephone cases from the 1930s, *Ohio Bell Telephone Co. v. Lung,* 129 Ohio St. 505 (1935), and *Cambridge, supra*. Both cases are distinguishable as they involved poles placed within the improved portion of the right-of-way.

{¶24} Based on the findings of failure to establish proximate cause and no duty owed to appellants by appellees, we find the trial court did not err in granting summary judgment to appellees.

{¶25} Assignments of Error I and II are denied.

{¶26} The judgment of the Court of Common Pleas of Stark County, Ohio is hereby affirmed.

By Farmer, J.

Gwin, P.J. and

Delaney, J. concur.

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