[Cite as *Duffett v. Abdoo*, 2010-Ohio-4700.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
SANDUSKY COUNTY

Judith Duffett, Administrator for the Estate of Terrance J. Duffett

Appellant

v.

Greg Abdoo, et al.

Appellees

v.

Phillip Mata, et al.

Third-Party Defendants

Court of Appeals No. S-09-035

Trial Court No. 08 CV 493

DECISION AND JUDGMENT

Decided: September 30, 2010

* * * * *

Russell Gerney and Kevin J. Boissoneault, for appellant.

Michael P. Murphy and Justin D. Harris, for appellees Abdoo Enterprises, Limited and Robert Abdoo.

Alan B. Dills, for appellees Greg Abdoo and Meechka Abdoo.

* * * * *

HANDWORK, J.

{¶ 1} This is an appeal from a judgment of the Sandusky County Court of Common Pleas.

{¶ 2} On February 28, 2004, a motor vehicle operated by Phillip Mata veered off County Road 181 into a drainage ditch and traveled approximately 130 feet on its right (passenger) side along the ditch before colliding with a concrete side wall on a driveway culvert built over the ditch. Mata's passenger, Terrance J. Duffett, died as the result of injuries he sustained in this accident.

{¶ 3} Appellant, Judith Duffett, Administrator of the Estate of Terrance J. Duffett, subsequently instituted the instant wrongful death action against appellees, Robert Abdoo, Abdoo Enterprises, Greg Abdoo, and Meechka Abdoo, as well as the Sandusky County Engineer, the Sandusky Board of Commissioners, and Mata[1]. Robert Abdoo and Abdoo Enterprises constructed the culvert in 1999. Greg and Meechka Abdoo are the owners of the property upon which the culvert is built. Originally, the driveway was stone; asphalt on the driveway and the concrete sidewalls on the culvert were added at a later time. It is undisputed that although the culvert is in the "right of way" it is at least four feet or more from the paved portion of County Road 181.

{¶ 4} All of the aforementioned defendants in this cause subsequently filed motions for summary judgment. The trial court granted summary judgment to the

[1]Appellant obtained a default judgment against Mata, who has no memory of the accident and tested positive for marijuana after the collision.

Sandusky County Engineer and the Sandusky County Board of Commissioners, finding that they could not be held liable under Ohio's Sovereign Immunity Statute, R.C. Chapter 2744. Appellant did not appeal this judgment. On October 8, 2009, the court granted summary judgment to appellees, Robert, Meechka, and Greg Abdoo and Abdoo Enterprises. Appellant appeals these judgments and asserts that the following error occurred in the proceeding below:

{¶ 5} "The trial court improperly granted summary judgment based upon its assessment of said evidence."

{¶ 6} Appellate courts review the grant of summary judgment de novo, applying the same standard used by the trial court. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. Accordingly, an appellate court reviews the same evidence that was properly before the trial court. *Am. Energy Servs., Inc. v. Leka*n (1992), 75 Ohio App.3d 205, 208. Summary judgment is appropriate if there is no genuine dispute of a material fact so that the issue is a matter of law and reasonable minds could come to but one conclusion, that being in favor of the moving party. Civ.R. 56(C); *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327. In ruling on a summary judgment motion, a court is not permitted to weigh evidence or choose among reasonable inferences, rather, the court must evaluate evidence, taking all permissible inferences and resolving questions of credibility in favor of the nonmoving party. *Jacobs v. Racevskis* (1995), 105 Ohio App.3d 1, 7.

{¶ 7} Appellant points to three rulings[2] made by the trial judge in his decision that she claims could only result from an impermissible weighing of the evidence on a motion for summary judgment. These are: (1) the "concrete culvert" is five feet eleven inches from the pavement; (2) the culvert "substantially complied with the controlling governmental entity requirements;" and (3) "the culvert was not the proximate cause of the accident."

{¶ 8} While we agree that the culvert may or may not have been five feet eleven inches from the pavement, it was four feet or more from the pavement in the right of way. Moreover, a review of Greg Abdoo's deposition reveals that at the time it was constructed, the culvert/stone driveway approach did comply with the permit issued in 1999. Of greatest importance, however, is the fact that this accident could not have been foreseen.

{¶ 9} To overcome a summary judgment motion in a negligence action[3], a plaintiff must prove that the defendant breached a duty owed to the plaintiff and that this breach was the proximate cause of the plaintiff's injuries. *Wallace v. Ohio Dept. of Commerce,* 96 Ohio St.3d 266, 2002-Ohio-4210, ¶ 22. The existence of duty in a negligence action is a question of law. *Mussivand v. David* (1989), 45 Ohio St.3d 314,

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[2]Appellant also set forth a product liability claim in her complaint. The trial court determined that "a culvert is not a product." Appellant does not appeal this finding.

[3]Count 3 of appellant's complaint sets forth a cause of action in qualified nuisance. That count must fail because appellant failed to establish her negligence claim. See *Allen Freight Lines, Inc. v. Consol. Rail Corp.* (1992), 64 Ohio St.3d 274, 276.

318. This duty depends on the foreseeability of the injury. *Huston v. Konieczny* (1990), 52 Ohio St.3d 214, 217. An injury is foreseeable if the defendants knew or should have known that their actions were likely to result in harm. Id. "The lack of foreseeability negates both the existence of an underlying duty and the element of proximate cause necessary to establish a prima facie case of negligence." *Stepanyan v. Kuperman*, 8th Dist. No. 88927, 2007-Ohio-4068, ¶ 7. Here, Mata's marijuana use, the subsequent deviation of his motor vehicle from County Road 18, and the 130 foot "slide" of that vehicle in and along the drainage ditch could not have been foreseen by appellees. Thus, appellant failed to establish a prima facie case of negligence. Accord, *Hurier v. Gumm* (Nov. 1, 1999), 12th Dist.No. CA99-01-005.

{¶ 10} Appellant's sole assignment of error is found not well-taken.

{¶ 11} The judgment of the Sandusky County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24(A).

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J.
CONCUR. _____
JUDGE

Keila D. Cosme, J.,
DISSENTS.

COSME, J., dissenting.

{¶ 12} I dissent because I believe the majority has misapplied the element of foreseeability. In affirming the trial court's entry of summary judgment in favor of appellees, the majority reasons that the third party concurrent tortfeasor's "marijuana use, the subsequent deviation of his motor vehicle from County Road 18, and the 130 foot 'slide' of that vehicle in and along the drainage ditch could not have been foreseen by appellees." The test of foreseeability, as either a precondition to duty or an adjunct of proximate cause, does not, however, require a showing of prescience in regard to the particulars of an injurious event.

{¶ 13} "'It is not necessary that the defendant should have anticipated the particular injury. It is sufficient that his act is likely to result in an injury to someone.'" *Strother v. Hutchinson* (1981), 67 Ohio St.2d 282, 287, quoting *Neff Lumber Co. v. First Natl. Bank*

(1930), 122 Ohio St. 302, 309. See, also, *Mussivand v. David* (1989), 45 Ohio St.3d 314, 321. "The injury must have been reasonably foreseeable; not that the defendant had to anticipate the particular injury that occurred, just that it could be reasonably anticipated that some type of injury would occur from the negligent act." *Zachariah v. Roby*, 178 Ohio App.3d 471, 2008-Ohio-4832, ¶ 44.

{¶ 14} In this case, it could be reasonably anticipated that a motor vehicle would veer onto the berm of the highway and strike the protruding concrete sidewall of appellee's driveway culvert, which the majority notes "is in the 'right of way' * * * of County Road 181." Moreover, the issue of proximate cause in this case, that is, whether the death of plaintiff's decedent would have occurred regardless of the presence of the concrete sidewall, is a disputed question of fact that only a jury can resolve. See *Anderson v. St. Francis-St. George Hosp., Inc* (1996), 77 Ohio St.3d 82, 84-85; *Wakefield v. John Russell Constr. Co.*, 7th Dist. No. 09-JE-19, 2010-Ohio-1294, ¶ 70; *Eastman v. Stanley Works*, 180 Ohio App.3d 844, 2009-Ohio-634, ¶ 42.

{¶ 15} Accordingly, I respectfully dissent.