

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

Rosemary S. Joyce, etc.

Court of Appeals No. L-10-1368

Appellant

Trial Court No. CI0200706640

v.

William Rough, et al.

DECISION AND JUDGMENT

Appellees

Decided: July 29, 2011

* * * * *

Joseph R. Gioffre and Michael S. Schroeder, for appellant.

Glenn E. Wasielewski, for appellees.

* * * * *

HANDWORK, J.

{¶ 1} This is an appeal from a decision of the Lucas County Court of Common Pleas granting summary judgment to appellee William Rough ("Rough") and his employer Toledo Area Regional Transit Authority ("TARTA"), and dismissing the claim of appellant Rosemary S. Joyce, Individually and as Administratrix of the Estate of

Edward M. Joyce, III, deceased. Joyce had alleged appellee Rough negligently struck and fatally injured the decedent, a 42-year-old man being treated for a mental illness, while driving a bus for TARTA within the course and scope of his employment. For the reasons that follow, we affirm.

{¶ 2} Appellant presents the following single assignment of error:

{¶ 3} "The trial court erred in granting the defendants-appellees' motion for summary judgment as there are genuine issues of material fact which can only be properly resolved by the jury."

{¶ 4} This court reviews the trial court's ruling on a summary judgment motion under a de novo standard. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, reconsideration denied (1996), 77 Ohio St.3d 1501. Summary judgment may be granted only when it is demonstrated: "* * * (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor." *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66; and Civ.R. 56(C). The burden of showing that no genuine issue of material fact exists falls upon the party who moves for summary judgment. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 294.

{¶ 5} "* * * [I]n order to establish actionable negligence, [the plaintiff] must show the existence of a duty, a breach of the duty, and an injury resulting proximately

therefrom." *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St.3d 75, 77. The issue of whether or not a duty exists in a negligence action is one of law for the court to determine. *Gin v. Yachanin* (1991), 75 Ohio App.3d 802, 804.

{¶ 6} "Under the law of negligence, a defendant's duty to a plaintiff depends upon the relationship between the parties and the foreseeability of injury to someone in the plaintiff's position." *Simmers v. Bentley Constr. Co.* (1992), 64 Ohio St.3d 642, 645. The common carrier/passenger relationship arises once a person goes to a designated place at the proper time and the common carrier takes action to accept the person as a passenger. *Bodley v. U.S. Air, Inc.* (1997), 10th Dist. No. 97APE03-430, at 2, and *Klovedale v. Ohio Public Service Co.* (1936), 54 Ohio App. 244, 248-249. TARTA, as a common carrier of passengers, has an obligation to exercise the highest degree of care to afford its passengers opportunity to alight in a reasonably safe place. *Feldman v. Howard* (1967), 10 Ohio St.2d 189, paragraph one of the syllabus, and *Dietrich v. Community Traction Co.* (1964), 1 Ohio St.2d 38, 41. However, the relation of carrier and passenger terminates when the passenger has been discharged safely upon the street, at which time the common carrier's heightened duty of care ceases. *Feldman v. Howard*, *supra*, paragraph two of the syllabus; *Mahoning and Shenango Ry. & Light Co. v. Leedy* (1922), 104 Ohio St. 487, paragraph three of the syllabus; and *Cleveland Ry. Co. v. Karbole* (1932), 125 Ohio St. 467, paragraph three of the syllabus.

{¶ 7} The following facts are undisputed in the case before us. On October 26, 2005, as Rough, a TARTA bus driver, was eastbound on East Woodruff Avenue

approaching the intersection of East Woodruff Avenue and Canton Avenue, Edward Joyce, a passenger, signaled for Rough to pull over for Joyce to exit at his usual stop at the Unison Behavioral Healthcare Center. Joyce was a 42-year old man who was living independently despite having a mental illness for which he was receiving medical care. Video images recorded by surveillance cameras located on the bus show Rough pulling the bus over near the curb on East Woodruff Avenue in the marked bus stop zone next to a bus shelter. The bus was parked a few feet from the solid white stop line next to the corner stop sign.

{¶ 8} When the bus came to a halt, the video images confirm that Joyce alighted safely from the bus and walked 10 to 15 feet toward the west side of the shelter. Rough testified he saw Joyce exit the bus and walk toward the shelter on the sidewalk, as other passengers often did, to walk through the bushes or shrubs on the south side of the shelter to enter the Unison facility. Rough further testified and the photographs from the video confirm Rough waited approximately five seconds from the time Joyce exited the bus until Rough moved the bus forward and away from the curb and near the shelter.

{¶ 9} As Rough was pulling the bus away, William Adler, the only eyewitness to the accident, was driving north on Canton Avenue one or two car lengths from the corner of Canton and Woodruff Avenues. Adler first saw Joyce as he was running from behind a tree in the treelawn area, which had been near the rear of the bus when it was parked. Adler saw Joyce run toward and alongside the bus while pounding on the rear side door or window apparently trying to get the driver's attention. The bus had started to go

through the stop sign. Adler stated that within seconds Joyce had tripped and fell between the bus and the curb near the corner. Adler then witnessed the bus run over Joyce after he had fallen in front of the right rear wheel of the bus. Adler saw Joyce dragged through the corner.

{¶ 10} Believing the right side of the bus went up onto the curb, Rough had continued turning onto Canton Avenue without stopping at the stop sign on Woodruff Avenue. When Rough looked in his right-side rearview mirror to see why he had hit the curb, he saw Joyce lying in the middle of the road. Rough then stopped the bus. Joyce died as a result of his injuries.

{¶ 11} Rough testified that before pulling the bus away from the curb, he had looked in both his left and right rearview mirrors. However, contrary to Rough's testimony, the video shows Rough observing the right-side rearview mirrors a few seconds after he began to pull away from the curb and traveled a few feet forward to the area next to the stop sign at the corner. Rough testified that he had neither seen nor heard Joyce and was not warned by the other passengers on the bus that Joyce was allegedly pounding on the rear door. Photographs taken from the video show that neither of the two passengers (one who sat in the back and one who sat directly above the right rear wheel), reacted to Joyce's alleged pounding on the bus. Rough allowed both passengers on the bus to leave the scene after the accident, and they were never identified.

{¶ 12} In her sole assignment of error, appellant presents several arguments. First, she contends that the trial court erred by granting summary judgment to appellees when there was a material question of fact as to whether Joyce had safely alighted from the bus.

{¶ 13} We find there is no question of material fact as to this issue. Rough testified that he saw Joyce exit the bus and proceed down the sidewalk. The video confirms that Joyce exited the bus and traveled 15 feet toward the west side of the shelter. Adler testified he first saw Joyce as he was running from behind the tree and up to the moving bus. Therefore, we find that there was no evidence to establish that Joyce did not fully alight from the bus to a place of safety.

{¶ 14} Second, appellant argues that the trial court erred by not finding that appellees at least owed Joyce a duty of ordinary care and that there was a material question of fact as to whether Rough should have seen Joyce running in the curb area or heard him pounding on the bus.

{¶ 15} Joyce never re-boarded the bus to regain his passenger status. Furthermore, he did not attempt to board the bus in a proper manner and his intention to board the bus was never communicated to Rough. Therefore, Joyce maintained a pedestrian status when he approached and pounded on the rear bus door.

{¶ 16} The operator of a vehicle does not have a duty to look for pedestrians violating his right of way unless he has reason to expect danger. R.C. 4511.01(TT) and (UU)(1), and 4511.48(A); *Deming v. Osinki* (1970), 24 Ohio St.2d 179, 180-181; *Wall v. Sprague*, 12th Dist. No. CA2007-05-065, 2008-Ohio-3384, ¶ 12; *Snider v. Nieberding*,

12th Dist. No. CA2002-12-105, 2003-Ohio-5715, ¶ 9; *Dixon v. Nowakowski* (Aug. 27, 1999), 6th Dist. No. L-98-1372; *Hawkins v. Shell* (June 4, 1998), 8th Dist. No. 72788. Furthermore, pedestrians are prohibited by law from leaving the curb or place of safety and entering the right of way of a motor vehicle. R.C. 4511.46(B). However, once a driver discovers a dangerous situation caused by a pedestrian in his right of way, the driver must exercise due care to avoid injuring the pedestrian. R.C. 4511.48(E); *Meyer v. Rapacz*, 8th Dist. No. 95571, 2011-Ohio-2537, ¶ 19, citing *Deming v. Osinki*, supra. Accord *Morris v. Bloomgren* (1933), 127 Ohio St. 147, paragraph five of the syllabus. 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." *Foulke v. Beogher*, 166 Ohio App.3d 435, 2006-Ohio-1411, ¶ 9. (Citations omitted.) Accord *Mussivand v. David* (1989), 45 Ohio St.3d 314, 318. The degree of care constituting ordinary care may also depend upon the type of pedestrian the driver can expect to be in the vicinity. *Franks v. Venturella* (June 28, 2000), 3d Dist. No. 1-2000-06, at 4, quoting *Rayoum v. Adams* (July 24, 1998), 6th Dist. No. L-97-1370 (a heightened duty of care is owed where young children are expected to be present). Accord *Sargent v. United Transp. Co.* (1978), 56 Ohio App.2d 159, 162-163.

{¶ 17} We conclude that Rough had no duty to look for Joyce entering his right of way. A violation of an internal safety manual is not the equivalent of violating a statute

and does not establish negligence per se. *Woods v. Ohio Dept. of Rehab. & Corr.* (1999), 132 Ohio App.3d 780, 783. Instead, we consider only whether there was any evidence to establish a violation of Rough's common law duty to exercise ordinary care. Appellant contends that Rough negligently failed to utilize his right rearview mirrors prior to leaving the curb as required by TARTA's Operator's Safety Manual. Rough was trained by TARTA to observe passengers and ensure that they clear the zone of danger before moving the bus. Rough was also taught to always look in the right-side rearview mirrors before pulling away from a stop to make sure nobody was near the bus. But, the violation of this internal safety rule does not automatically establish a breach of Rough's duty to exercise ordinary care.

{¶ 18} Although the video evidences that Rough did not look into his right-side rearview mirrors until after he began to leave the curb, Rough watched decedent alight from the bus and presumed that Joyce had headed toward his destination. Rough testified he never saw Joyce near the bus. Rough had no reason to believe that Joyce, after safely alighting from the bus, would voluntarily place himself in danger by approaching the bus in the curb area as it was moving. Even though it was alleged that Rough knew that Joyce had some type of mental deficiencies, Rough did not have knowledge of any disability that would suggest that Joyce would approach a moving bus. Joyce was capable of living independently and had frequently traveled on the bus to this stop.

{¶ 19} Even if Rough had appropriately looked in his right rearview mirrors before moving the bus as he had been trained, there is no evidence that Rough would

have seen Joyce. Adler witnessed Joyce pounding on the side of the bus only after the bus had already pulled away from the curb. Therefore, even if Rough had looked in his mirrors prior to leaving the curb, there is no evidence that at that moment he would have seen Joyce running toward the bus.

{¶ 20} Finally, appellant contends that Rough negligently failed to stop at the stop line on Woodruff Avenue at the intersection with Canton Avenue. While R.C. 4511.43(A) requires every driver to stop his vehicle at a stop sign, "it does not state the exact distance from the stop line from which a vehicle must come to a stop to be considered stopped at the stop sign." *Grossman v. Andros* (1999), 135 Ohio App.3d 712, 716.

{¶ 21} Rough testified that he did not specifically stop at the white stopping line at the intersection of Woodruff Avenue and Canton Avenue, despite having told his supervisor otherwise. However, the video shows that Rough came to a full stop in front of the Woodruff Avenue bus shelter, which was only a few feet in front of the stop sign at the intersection. Considering the size of the bus and the distance ahead, this stop could be sufficient under the law. Nonetheless, whether Rough properly stopped at the stop sign is immaterial. Even if Rough had stopped at the stop sign before making the turn, Rough would not have known that Joyce was falling or had fallen under the bus at this time. Appellant argues that had Rough stopped, Joyce would have been able to reach the front of the bus and the accident would have been avoided. However, the video shows that it was at about this same time that Rough did look in his mirrors and did not see

Joyce near the bus. Rough's alleged violation of R.C. 4511.43(A) could not be the proximate cause of Joyce's injury. The evidence clearly establishes that Joyce violated Rough's right of way by entering the roadway, albeit involuntarily, by falling, and thereby violating R.C. 4511.46(B).

{¶ 22} Third, appellant argues that the trial court erred by applying contributory negligence principles to Joyce's conduct instead of the comparative negligence standard.

{¶ 23} We disagree. Before the plaintiff must assert the affirmative defense of contributory negligence, the defendant must first prove that there was a breach of the duty owed by plaintiff, which proximately caused the defendant injury. *Brinkmoeller v. Wilson* (1975), 41 Ohio St.2d 223, 226, and *Withers v. Mercy Hosp. of Fairfield*, 12th Dist. No. CA2010-02-033, 2010-Ohio-6431, ¶ 11.

{¶ 24} In the case before us, the trial court concluded that there was no evidence presented to establish that Rough violated his duty of ordinary care owed to Joyce. Instead, the court found that the evidence established that the accident was caused by Joyce running alongside the moving bus and falling into the street when he stumbled. Therefore, the affirmative defense of comparative negligence is irrelevant to this case.

{¶ 25} Finally, appellant argues that there were many factual issues in this case which would preclude summary judgment. First, she argues that Rough testified that he watched Joyce walk for five seconds, but the video shows he was not watching at all. While we note from the video that Rough turned his head back to the front of the bus, there is no way to determine from the video what Rough could still see within his

peripheral line of sight. Furthermore, whether Rough saw Joyce travel all the way to the side of the shelter is not a material question. The facts relevant to this case, as evidenced by the video and Adler's testimony, are that Joyce exited the bus in a normal fashion and then suddenly returned to the bus.

{¶ 26} Second, appellant argues that there is a conflict between the testimony of Rough and the video as to whether Rough looked in his right rearview mirrors before leaving the curb. We find no conflict between this evidence. It is clear that Rough looked in the mirrors as he was pulling away and not before he left the curb. But, we have determined that this fact is irrelevant to the resolution of this case.

{¶ 27} Third, appellant argues that there is a factual conflict between the testimony of Rough that Joyce crossed the sidewalk and proceeded as others did to go through the bushes and the testimony of Adler that Joyce was pounding on the bus as it "just started moving." More precisely, Adler's written statement was that he saw Joyce by the bus as it was leaving. Adler never saw Joyce on the sidewalk and Rough saw Joyce on the sidewalk and presumed that Joyce was heading to the bushes. Adler testified that he first became aware of Joyce as he was running toward the bus along the grass next to the curb as the bus was turning the corner. We find that the testimonies are not conflicting.

{¶ 28} Fourth, appellant argues that testimony that Adler saw Joyce pounding on the bus for five seconds conflicts with the testimony of Rough that he did not hear anything. Again, appellant mischaracterizes Adler's testimony. He testified that the

whole event was over in seconds, perhaps five seconds, not that Joyce pounded on the bus for five seconds. In any event, whether Joyce pounded for a full five seconds does not conflict with Rough's testimony that he did not hear the pounding.

{¶ 29} Finally, appellant argues that the video and Adler's testimony indicate that Rough did not stop at the stop sign, while Rough's supervisor testified that Rough had told him that he had stopped at the sign. This factual issue is not material to this case. Whether or not Rough properly stopped for the stop sign was not relevant to the case.

{¶ 30} In her reply brief, appellant argues that there was a question of fact regarding the cause of the accident based upon the deposition testimony of the officer responsible for accident reconstruction, which was taken after the motion for summary judgment had been filed. He testified that the preliminary investigation of the accident was very poorly conducted. By the time the officer had arrived at the scene, Joyce's body had been moved and the witnesses were gone. He could not determine where Joyce had first been run over. No one could tell him where Joyce had moved to before returning to the bus. He was informed that a witness had seen Joyce running toward the bus and tapping on the bus near the rear wheel. The officer investigated the bus to determine if Joyce's clothing caught on something that caused him to be pulled under the bus. He found an open latch, but could not determine if Joyce had come into contact with it. Nonetheless, from the evidence from the scene and the information he was given from the witnesses and people at the scene, he concluded that this was a simple accident.

{¶ 31} Considering this additional evidence, we find that there was no evidence to support appellant's claim that Rough violated his duty of ordinary care owed to Joyce. The officer could not testify as to the cause or timing of Joyce's fall. Therefore, his testimony did not give rise to a question of material fact.

{¶ 32} Accordingly, we find that the trial court did not err in granting summary judgment to appellees. Appellant's sole assignment of error is found not well-taken.

{¶ 33} Having found that the trial court did not commit error prejudicial to appellant, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the court costs of this appeal pursuant to App.R. 24.

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

Arlene Singer, J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

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