[Cite as *Slabaugh v. Kukta*, 2005-Ohio-6454.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF WAYNE	)	

PAT SLABAUGH	C. A. No. 05CA0022
Appellant	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
JOHN P. KUKTA, et al.	COURT OF COMMON PLEAS COUNTY OF WAYNE, OHIO
Appellees	CASE No. 03-CV-0741

DECISION AND JOURNAL ENTRY

Dated: December 7, 2005

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

MOORE, Judge.

{¶1} Appellant, Pat Slabaugh, appeals from the trial court's grant of summary judgment in favor of Appellees. This Court affirms.

I.

{¶2} Appellant was injured while on the property of Appellees, Autumn and John Kukta. Prior to the day of her injury, Appellant had cleaned Appellees' home to earn income and was familiar with the property. On December 12, 2001, Appellant was cleaning another home located next door to Appellees' home. Autumn Kukta called out to Appellant and asked her to come over to see the

Kuktas' new golf cart. The golf cart was stored inside a barn which was located within a fenced area that held Appellees' two horses.

{¶3} While walking to the barn, inside the fenced area, Appellant fell and broke her ankle. Appellant believed that one of the horses had knocked her down. As a result, Appellant filed suit against Appellees on December 16, 2003 alleging that Appellees' negligence caused her injuries. On December 15, 2004, Appellees moved for summary judgment, arguing that they had not breached any duty to Appellant and that they were entitled to immunity. Appellant responded in opposition to the motion, urging that no facts were in dispute and that a jury could conclude that Appellees had breached a duty owed to Appellant. The trial court granted Appellees' motion on February 17, 2005, without any supporting rationale. Appellant timely appealed that judgment, raising one of assignment of error for review.

ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED IN GRANTING APPELLEES' MOTION FOR SUMMARY JUDGMENT."

{¶4} In her sole assignment of error, Appellant asserts that the trial court erred in granting summary judgment in favor of Appellees. Specifically, Appellant argues that Appellees were not entitled to immunity under the equine immunity act and that a question of fact remains as to whether Appellees breached their common law duty to Appellant. We disagree.

{¶5} This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. We apply the same standard as the trial court, viewing the facts of the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party. *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12, certiorari denied (1986), 479 U.S. 948.

{¶6} Pursuant to Civil Rule 56(C), summary judgment is proper if:

> "(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 party against whom the motion for summary judgment is made, that conclusion is adverse to that party." *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

{¶7} The party moving for summary judgment bears the initial burden of informing the trial court of the basis for the motion and pointing to parts of the record that show the absence of a genuine issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-93. Specifically, the moving party must support the motion by pointing to some evidence in the record of the type listed in Civ.R. 56(C). Id. Once this burden is satisfied, the non-moving party bears the burden of offering specific facts to show a genuine issue for trial. Id. at 293. The non-moving party may not rest upon the mere allegations and denials in the pleadings but instead must point to or submit some evidentiary material that demonstrates a

genuine dispute over a material fact. *Henkle v. Henkle* (1991), 75 Ohio App.3d 732, 735.

{¶8} In their motions, both parties rely upon the depositions of Appellant and Autumn Kukta. Based upon the depositions, there is no factual dispute as to what occurred on December 12, 2001. While walking in a fenced-in area, Appellant fell and broke her ankle. Both parties believe that a horse knocked Appellant to the ground, but neither could state such a fact with certainty. Specifically, Appellant responded to questions regarding the cause of her fall as follows:

> "A. I don't know what made me fall. I just remember falling.
>
> "Q. But do you feel that you were pushed by something?
>
> "A. Something, I thought maybe someone threw a ball or something and hit me in the back; something where I lost my balance."

Autumn Kukta noted that the fall could have been caused by a horse or Appellant's foot may have gotten stuck in a rut in the ground. Specifically, Autumn Kukta swore in her deposition as follows:

> "A. *** And I don't know if it was a horse, but it was bump. It wasn't a kick or anything, just something. And I was holding [Appellant]. I don't know if her if the foot caught in a rut but we both went down.
>
> "Q. But you were bumped by the horse in some manner you believe?
>
> "A. I believe, yeah. Or it swung its rump around or – I don't know if it was the force, something had hit me but – I don't know if [Appellant] got caught, and we both went down." (Sic.)

Accordingly, we are left to consider whether as a matter of law Appellees were entitled to judgment.

{¶9} In order to prevail on her claim, Appellant was required to prove (1) that Appellees owed a duty of care to her, (2) that Appellees breached that duty, and (3) that the breach of the duty proximately caused her injury. *Chambers v. St. Mary's School* (1998), 82 Ohio St.3d 563, 565. The parties do not dispute that Appellant was a social guest of Appellees. In *Scheibel v. Lipton* (1951), 156 Ohio St. 308, the Supreme Court of Ohio set forth the duty of care owed to a social guest.

> "A host who invites a social guest to his premises owes the guest the duty (1) to exercise ordinary care not to cause injury to his guest by any act of the host or by any activities carried on by the host while the guest is on the premises, and (2) to warn the guest of any condition of the premises which is known to the host and which one of ordinary prudence and foresight in the position of the host should reasonably consider dangerous, if the host has reason to believe that the guest does not know and will not discover such dangerous condition." Id. at paragraph three of the syllabus.

The Court in *Scheibel* also held that "[a] host is not an insurer of the safety of a guest while upon the premises of the host and there is no implied warranty on the part of a host that the premises to which a guest is invited by him are in safe condition." Id. at paragraph two of the syllabus. Further, it is well settled that "[a]n owner or occupier of land owes no duty to warn invitees entering the property of an open and obvious danger on its property." *Lovell v. Hawks* (June

28, 2000), 9th Dist. No. 99CA007425, at *2, quoting *Musa v. Musa* (Dec. 10, 1996), 10th Dist. No. 96APE07-831, at *2.

{¶10} However, "a mere failure to act cannot be the basis for negligence under the common law unless some special relationship exists between the parties or unless circumstances exist that would impose an affirmative duty upon the defendant to act." *Hernandez v. Ohio Dept. of Rehabilitation* (1990), 62 Ohio Misc.2d 249, 255. Appellant has not argued that a special relationship existed that would have required Appellees to act to protect Appellant from the horse. Further, this Court can find no authority which would establish a special relationship between Appellant and Appellees. Accordingly, any claim by Appellant that Appellees breached their duty of ordinary care by failing to act to protect her from the horse must fail.

{¶11} As a result, Appellant must rely upon the theory that Appellees failed to warn Appellant of the danger posed by the horses. As noted above, however, Appellees are not required to warn Appellant of open and obvious dangers. Appellant's deposition demonstrated that she was aware of the dangers posed by the horses and generally kept her distance from the horses. Accordingly, we find that the horses posed an open and obvious danger. Accordingly, Appellees did not have a duty to warn Appellant of the dangers related to the horses.

{¶12} Viewing the evidence in a light most favorable to Appellant, reasonable minds could only conclude that Appellees did not breach their duty of ordinary care and had no duty to warn Appellant of the dangers posed by the horses. Accordingly, the trial court did not err in granting summary judgment in favor of Appellees. Appellant's sole assignment of error is overruled.

III.

{¶13} Appellant's sole assignment of error is overruled. The judgment of the Wayne County Court of Common Pleas is affirmed.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Wayne, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this

judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

Exceptions.

CARLA MOORE
FOR THE COURT

SLABY, P. J.
CONCURS

REECE, J.
CONCURS, SAYING:

{¶14} I concur for the additional reason that no evidence was submitted regarding what actually caused the accident.

(Reece, J., retired, of the Ninth District Court of Appeals, sitting by assignment pursuant to, §6(C), Article IV, Constitution.)

APPEARANCES:

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