[Cite as *Williams v. AVI Food Sys., Inc.*, 2020-Ohio-5001.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STEVE WILLIAMS,	:	
Plaintiff-Appellant,	:	No. 109222
v.	:	
AVI FOOD SYSTEMS, INC., ET AL.,	:	
Defendants-Appellees.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: REVERSED AND REMANDED
RELEASED AND JOURNALIZED: October 22, 2020

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-18-900160

Appearances:

Alkire & Neiding, L.L.C., and Richard C. Alkire; Paul V. Wolf, *for appellant.*

Frantz Ward, L.L.P., Christopher G. Keim, and Klevis Bakiaj, *for appellees*.

RAYMOND C. HEADEN, J.:

{¶ 1} Plaintiff-appellant Steve Williams ("Williams") appeals from the trial court's decision to grant defendants-appellees AVI Food Systems, Inc.'s ("AVI") and

David Samay's ("Samay") (collectively, "Defendants") motion for summary judgment. For the reasons that follow, we reverse.

Procedural and Substantive History

{¶ 2} On June 28, 2018, Williams filed a complaint against Defendants alleging negligence. Williams alleged that in the early morning hours of January 4, 2017, while he was walking eastbound on the south side of Brook Park Road in Brook Park, Ohio, he was forced to walk on the road to avoid the flooded sidewalk and tree lawn. At the same time, Samay was driving a large box-truck, in the course and scope of his employment with AVI. Williams alleged that Samay negligently operated the truck in such a fashion so as to strike Williams even though he was clearly visible. Specifically, Williams alleged that Samay "was negligent in failing to keep a proper lookout and/or to look effectively" with the result that he caused Williams severe and permanent personal injury. Williams alleged that AVI was liable for Samay's negligence through the doctrine of respondeat superior.

{¶ 3} On August 28, 2018, Defendants filed an answer, in which they denied Williams's allegations and raised numerous affirmative defenses, including that Williams's claims were caused in whole or in part due to his own comparative negligence.

{¶ 4} On May 31, 2019, Defendants filed a motion for summary judgment, in which they argued that Williams's conduct was solely responsible for creating the dangerous situation that resulted in Samay striking him. Therefore, according to

Defendants, Williams was more contributorily negligent than Samay. The motion did not otherwise address Samay's negligence.

{¶ 5} On July 1, 2019, Williams filed a brief in opposition to Defendants' motion for summary judgment. Williams argued that Defendants had not addressed the elements of general negligence and, furthermore, that Samay violated R.C. 4511.21(A), Ohio's assured clear distance statute. Williams also argued that whether he was negligent for walking on the road was a question for the jury.

{¶ 6} On July 11, 2019, Defendants filed a reply brief in support of their motion for summary judgment. Defendants argued that Williams improperly inserted a new theory, that Samay was liable under R.C. 4511.21(A), which had not been previously pleaded. Therefore, Defendants argued that the trial court should disregard that argument. Defendants also argued that even analyzing Williams's claim under R.C. 4511.21(A), there was no genuine issue of material fact.

{¶ 7} On October 15, 2019, the trial court granted Defendants' motion for summary judgment. Williams appealed, presenting one assignment of error for our review.

Law and Analysis

{¶ 8} In his sole assignment of error, Williams argues that the trial court erred in granting Defendants' motion for summary judgment because there was a genuine issue of material fact as to whether Samay was negligent. We agree.

{¶ 9} We review summary judgment rulings de novo, applying the same standard as the trial court. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671

N.E.2d 241 (1996). We accord no deference to the trial court's decision and conduct an independent review of the record to determine whether summary judgment is appropriate.

{¶ 10} Under Civ.R. 56, summary judgment is appropriate when no genuine issue exists as to any material fact and, viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can reach only one conclusion that is adverse to the nonmoving party, entitling the moving party to judgment as a matter of law. On a motion for summary judgment, the moving party carries an initial burden of identifying specific facts in the record that demonstrate their entitlement to summary judgment. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264 (1996).

{¶ 11} If the moving party fails to meet this burden, summary judgment is not appropriate; if the moving party meets this burden, the nonmoving party has the reciprocal burden to point to evidence of specific facts in the record demonstrating the existence of a genuine issue of material fact for trial. *Id*. at 293. Summary judgment is appropriate if the nonmoving party fails to meet this burden.

{¶ 12} As an initial matter, we will address Defendants' argument that Williams was impermissibly attempting to broaden his claim by inserting a new theory of liability under R.C. 4511.21(A) into his brief in opposition to their motion for summary judgment. Defendants are correct that, generally, a plaintiff cannot enlarge their claims during the summary judgment phase of litigation and is limited to the allegations of their pleading. *Karsnak v. Chess Fin. Corp.*, 8th Dist. Cuyahoga

No. 97312, 2012-Ohio-1359, ¶ 48. Under the notice-pleading requirements of Civ.R. 8(A)(1), a plaintiff need only plead sufficient, operative facts to support recovery under his claims. *Henderson v. State*, 8th Dist. Cuyahoga No. 101862, 2015-Ohio-1742, ¶ 10, citing *Doe v. Robinson*, 6th Dist. Lucas No. 1-07-1051, 2007-Ohio-5746, ¶ 17.

{¶ 13} This and other Ohio courts have held that "'when a plaintiff raises a negligence claim, the defendant is on notice that negligence per se may be raised, regardless of whether the statute was listed in the complaint.'" *Collier v. Libations Lounge, L.L.C.*, 8th Dist. Cuyahoga No. 97504, 2012-Ohio-2390, ¶ 24, quoting *Lone Star Steakhouse & Saloon of Ohio, Inc. v. Quaranta*, 7th Dist. Mahoning No. 01 CA 60, 2002 Ohio App. LEXIS 7282, 21 (Mar. 18, 2002). "'Negligence and negligence per se are so closely intertwined that a separate pleading specifying a statute section is not required to comply with the notice pleading requirement.'" *Id.* at 24, quoting *Lone Star Steakhouse & Saloon of Ohio, Inc.* at *21.

{¶ 14} In reaching this conclusion, courts have reasoned that preparing for the two types of negligence claims does not require substantially more preparation. *Id.* This reasoning clearly applies to the facts of this case.

{¶ 15} A claim of negligence requires the plaintiff to show the existence of a duty, a breach of that duty, and an injury resulting proximately from the breach. *Menifee v. Ohio Welding Prods., Inc.*, 15 Ohio St.3d 75, 77, 472 N.E.2d 707 (1984). Generally, a motor vehicle has the right to proceed uninterruptedly in a lawful manner in the direction in which it is traveling in preference to any vehicle or

pedestrian approaching from a different direction into its path. R.C. 4511.01(UU)(1). While a driver generally need not look for pedestrians or vehicles violating his right-of-way, they must exercise due care to avoid colliding with a pedestrian in their right-of-way upon discovering a dangerous or perilous situation. *Meyer v. Rapacz*, 8th Dist. Cuyahoga No. 95571, 2011-Ohio-2537, ¶ 19, citing *Snider v. Nieberding*, 12th Dist. Clermont No. CA2002-12-105, 2003-Ohio-5715, ¶ 9, citing *Deming v. Osinski*, 24 Ohio St.2d 179, 180, 265 N.E.2d 554 (1970); R.C. 4511.48(E).

{¶ 16} Ohio law provides that the "assured-clear-distance statute is a specific requirement of law, the violation of which constitutes negligence per se." *Tomlinson v. Cincinnati*, 4 Ohio St.3d 66, 69, 446 N.E.2d 454 (1983). R.C. 4511.21(A) provides:

> No person shall operate a motor vehicle, trackless trolley, or streetcar at a speed greater or less than is reasonable or proper, having due regard to the traffic, surface, and width of the street or highway and any other conditions, and no person shall drive any motor vehicle, trackless trolley, or streetcar in and upon any street or highway at a greater speed than will permit the person to bring it to a stop within the assured clear distance ahead.

Ohio courts have consistently held that a person violates this statute if there is evidence that the driver collided with an object that (1) was ahead of him in his path of travel, (2) was stationary or moving in the same direction as the driver, (3) did not suddenly appear in the driver's path, and (4) was reasonably discernible. *Pond v. Leslein*, 72 Ohio St.3d 50, 52, 647 N.E.2d 477 (1995), citing *Blair v. Goff-Kirby Co.*, 49 Ohio St.2d 5, 7, 358 N.E.2d 634 (1976).

{¶ 17} An examination of Williams's complaint reveals that, although he did not explicitly reference R.C. 4511.21, he included allegations directly related to each of the four elements listed above. Further, Williams submits that the duty underlying his negligence claim arises from R.C. 4511.21. It follows that Williams satisfied the requirements of Civ.R. 8(A) and sufficiently placed Defendants on notice of his claims.

{¶ 18} Further, we note that unlike some of the cases cited by Defendants in support of their argument that we should not consider the R.C. 4511.21 claim, this is not an argument that was never considered by the trial court. A review of the record reveals that Williams first raised this claim in his brief in opposition to Defendants' motion for summary judgment. In their reply brief in support of their motion for summary judgment, Defendants responded to the substance of the claim. In ruling on Defendants' motion for summary judgment, the trial court did not issue a written opinion or provide an explanation of its reasoning in a journal entry beyond reciting the legal standard for summary judgment. Therefore, although we cannot discern the trial court's explicit reasoning, the record reveals that the trial court was able to consider the R.C. 4511.21 claim. For these reasons, we conclude that although Williams did not include an explicit reference to Ohio's assured clear distance statute in his complaint, Defendants were nonetheless on notice that such a claim may be raised.

{¶ 19} Turning to the substance of the summary judgment question, Williams asserts that there is no dispute as to the first three elements he must satisfy

to establish a violation of R.C. 4511.21(A). The record reflects that Williams was walking eastbound on Brook Park Road, making his way from the Brook Park Rapid Station to his workplace at Avalon Precision Metalsmiths. The record also reflects that Samay had made a right turn onto Brook Park Road from Engle Road, and proceeded to travel eastbound on Brook Park Road. Therefore, the record shows that Williams was ahead of Samay in his path of travel, and Williams was traveling in the same direction as Samay, satisfying the first two elements. The record also reflects that Williams had been walking in the roadway, in the eastbound lane and close to the curb, for some time prior to being struck by Samay, and therefore did not suddenly appear in Samay's path.

{¶ 20} Therefore, the dispositive issue for this court is whether there is a genuine issue of material fact with respect to whether Williams was reasonably discernible before Samay struck him. Where conflicting evidence is introduced as to any of the elements necessary to constitute a violation of the statute, a jury question is created. *Tomlinson*, 4 Ohio St.3d at 69, 446 N.E.2d 454, citing *McFadden v. Elmer C. Breuer Transp. Co.*, 156 Ohio St. 430, 435, 103 N.E.2d 385 (1952). Further, the issue of whether an object is reasonably discernible is usually a question of fact for a jury to determine. *Cleveland Elec. Illum. Co. v. Major Waste Disposal*, 2016-Ohio-7442, 74 N.E.3d 689, ¶ 21 (11th Dist.), citing *Sharp v. Norfolk & W. Ry. Co.*, 36 Ohio St.3d 172, 522 N.E.2d 528 (1988), syllabus. After a review of the record, we find that the parties have presented disputed evidence as to the conditions that may or may not have rendered Williams reasonably discernible.

{¶ 21} Defendants argue that Williams has failed to present any evidence showing that he was discernible to Samay, and to the contrary, the record contains undisputed evidence that Williams was essentially invisible. Specifically, Defendants point out that Williams was walking on the roadway in predawn darkness, wearing dark clothing, and carrying a dark backpack. In response, Williams points to both his own deposition testimony and that of Samay. Williams testified that several other eastbound cars had passed him in the moments before he was struck, and one flashed its headlights, which Williams interpreted as an indication that the driver saw him. Samay testified that he was able to see the road ahead of him as well as the curb to his right, where Williams was walking. As to the lighting specifically, Samay also testified that although he was using his headlights at the time, the road was lit enough that he could see the road in front of him even if he had not been using his headlights. Williams also argues that he was wearing a light-colored camouflage hoodie. Viewing the evidence in the light most favorable to Williams, as we are required to do, we do not find that reasonable minds can reach only one conclusion as to whether Williams was reasonably discernible.

{¶ 22} In accordance with the foregoing, and without offering any speculation as to whether Williams's claims are meritorious, we find that there are genuine issues of material fact and it has not been established that defendants are entitled to judgment as a matter of law.

{¶ 23} The judgment of the trial court is reversed, and the case is remanded to the trial court for further proceedings consistent with this opinion.

It is ordered that appellant recover of appellees costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

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

RAYMOND C. HEADEN, JUDGE

FRANK D. CELEBREZZE, JR., P.J., and
LARRY A. JONES, SR., J., CONCUR