COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

CHRISTINA LASLEY, ET AL.	**:**	
Plaintiffs	**:**	**CASE NO. 2015 CVC 00115**
vs.	**:**	**Judge McBride**
TERRY G. ADAMS, ET AL.	**:**	**DECISION/ENTRY**
Defendants	**:**	

Phillips Law Firm, Inc., John H. Phillips and Anthony B. Holman, 9521 Montgomery Road, Cincinnati, Ohio 45242, and George P. Montgomery, 45 N. Market Street, Batavia, Ohio 45103, counsel for the plaintiffs Christina Lasley, Dana Lasley, and James Lasley,

Roetzel & Andress, LPA, Bradley A. Wright, 222 South Main Street, Akron, Ohio 44308, and Bradley L. Snyder and Tyler M. Jolley, 155 East Broad Street, 12th Floor, Columbus, Ohio 43215, counsel for the defendants Terry G. Adams and Dean Transportation, Inc.

Heartland Health and Wellness Fund, defendant, 7250 Poe Avenue, Suite 300, Dayton, Ohio 45414

This cause is before the court for consideration of the motion for summary judgment filed on February 29, 2016, by the defendants Terry G. Adams and Dean Transportation, Inc.

The court established a briefing/hearing schedule, and after the briefing was completed the court heard oral arguments as to the motion on May 20, 2016. At the

conclusion of the arguments, the court took the issues raised by the motion under advisement.

Upon consideration of the motion, the record of the proceeding, the evidence presented for the court's consideration, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE AND PROCEDURAL BACKGROUND

The instant case stems from a collision in which a truck allegedly struck a pedestrian. The defendant Dean Transportation, Inc. employed the defendant Terry G. Adams as a local route driver.[1] On the night of the accident, January 28, 2013, Adams drove his commercial truck eastbound along State Route 125 in Clermont County as he made his way to Hamersville Elementary School to deliver milk from Newport, Kentucky.[2]

The accident occurred when Adams was driving between Bethel and Hamersville. State Route 125 between Bethel and Hamersville consists of two lanes, one in each direction, with a posted speed limit of 55 M.P.H.[3] Along this part of State Route 125, there is no sidewalk; instead, there is a narrow shoulder with a width of approximately 22 inches.[4] Next to the shoulder is a 19 inch gravel and grass berm that abuts a guardrail.[5]

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[1] T. Adams Aff., ¶ 2.
[2] T. Adams Aff., ¶¶ 2-3; T. Adams Dep., 15:7-9; Ex. 1 to T. Adams Dep.
[3] T. Adams Aff., ¶ 3; T. Adams Dep., 16:19-21, 22:14-18.
[4] T. Adams Dep., 22:19-22; C. Lasley Dep., 165:9-12; D. Disbennett Dep., 24:19-25:1; F. Lickert, Aff. ¶ 7.
[5] F. Lickert, Aff. ¶¶ 7-8.

As Adams drove that stretch of roadway at approximately 40 to 45 M.P.H., there was traffic in front and behind his vehicle, as well as oncoming traffic in the other lane.[6] As Adams rounded a bend, he avers he heard a "thud," which sounded like he struck something with his right fender.[7]

It was approximately 7:00 p.m. at that time, and Adams had his headlights on.[8] The road was dark, and it was raining.[9] Adams had not seen anything before or after the sound, and avers that he was in his lane of travel when the "thud" occurred.[10] The vehicles driving immediately in front of him did not move to avoid anything.[11]

Adams stopped his vehicle in his lane and got out to investigate.[12] He initially did not see anything that caused the thud when he walked behind his truck, but as he walked back to his truck, he heard a moan and discovered the plaintiff Christina Lasley.[13] She was facedown, near the guardrail.[14]

Lasley had been walking along State Route 125 as a pedestrian for approximately two miles when the accident occurred.[15] She was walking against the flow of traffic, in a westbound direction.[16]

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[6] T. Adams Aff., ¶ 3; T. Adams Dep., 16:22-24.
[7] T. Adams Aff., ¶ 5; T. Adams Dep., 24:21-25:10.
[8] T. Adams Aff., ¶ 3; T. Adams Dep., 16:15-18.
[9] T. Adams Aff., ¶ 3; T. Adams Dep., 16:6-8; Ex. 1 to T. Adams Dep., Traffic Crash Report; C. Lasley Dep., 159:15-17; D. Disbennett Dep., 23:3-7. The plaintiffs object to consideration of the Traffic Crash Report, which the defendants attached to their motion for summary judgment, on the basis that it is unauthenticated. Because the report is part of the record as an exhibit in multiple, filed depositions, in which it is authenticated, the court will consider it in its summary judgment determination.
[10] T. Adams Aff., ¶ 5; Ex. 1 to T. Adams Dep.
[11] T. Adams Dep., 24:18-20.
[12] T. Adams Dep., 25:20-26:2.
[13] T. Adams Dep., 25:20-26:16.
[14] T. Adams Dep., 44:2-46:9.
[15] C. Lasley Dep., 158:18-159:5.
[16] C. Lasley Dep., 166:20-167:10.

Lasley does not remember being involved in an accident with Adams' truck, so she is unsure of exactly where she was walking and whether she was in the road or on the shoulder.[17] Her last recollection before the accident occurred was that she was walking along the shoulder of State Route 125, approximately one quarter to one half mile from where the accident occurred.[18] Lasley had intended to walk along the shoulder that evening, off of the road.[19]

Before hearing the "thud," Adams never saw Lasley when she was walking, and he is unsure of whether she was in his lane or along the shoulder.[20] Adams described Lasley's clothing that evening as dark.[21] Lasley had been wearing a gray hooded sweatshirt and jeans.[22] She did not have any sort of reflective gear or flashlight with her.[23]

Adams' truck suffered damage to the fender.[24] Paint from the fender appeared to have transferred onto Lasley's sweatshirt.[25] Bloodstains were located 2.5 feet from the white line of the road, and no blood stains were found on the road itself.[26] The accident report concluded that the fender struck Lasley's arm and the side mirror struck her face.[27] Adams was not cited for any traffic violations.[28]

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[17] C. Lasley Dep., 173:7-9, 175:18-177:13, 180:4-12.
[18] C. Lasley Dep., 173:10-17, 211:10-23.
[19] C. Lasley Dep., 181:6-13.
[20] T. Adams Dep., 29:16-30:2, 30:12-16.
[21] T. Adams Dep., 50:22-51:12.
[22] Ex. 1 to T. Adams Dep; C. Lasley Dep., 168:4-19, 185:2-13.
[23] C. Lasley Dep., 170:9-17.
[24] T. Adams Aff., ¶ 8; T. Adams Dep., 28:22-29:2; Ex. 1 to T. Adams Dep.
[25] Ex. 1 to T. Adams Dep.
[26] F. Lickert, Aff. ¶ 6.
[27] Ex. 1 to T. Adams Dep.
[28] T. Adams Aff., ¶ 9; Ex. 1 to T. Adams Dep.; D. Disbennett Dep., 14:1-2.

The plaintiffs' expert, Frederick W. Lickert, a traffic reconstructionist, avers that "there is no physical evidence to support the conclusion that Ms. Lasley was walking in the roadway."[29] He further avers that, based on the measurements of the shoulder and berm, Lasley would have been able to walk completely within the shoulder and berm at the spot where the accident occurred.[30]

As a result of the accident, Lasley suffered skull and facial fractures, a bulging disc in her lower back, a paralyzed right tear duct, and a traumatic brain injury.[31] Because of the traumatic brain injury, she continues to have memory focus and cognitive issues.[32] She also now suffers from depression and anxiety, which she did not have before the accident.[33]

On January 27, 2015, the plaintiffs Christina Lasley, Dana Lasley, and James Lasley filed their complaint in this case against the defendants Terry G. Adams, Dean Transportation, Inc., and Heartland Health and Wellness Fund. They filed an amended complaint on April 17, 2015. The claims include negligence, negligence per se, respondeat superior, and loss of consortium, and Heartland Health and Wellness Fund is named because it may have a subrogation interest.

LEGAL STANDARD

The court must grant summary judgment, as requested by a moving party when:

[29] F. Lickert, Aff. ¶ 12.
[30] F. Lickert, Aff. ¶ 8.
[31] Ex. 1 to T. Adams Dep.; C. Lasley Dep., 55:8-56:5, 84:13-85:11.
[32] C. Lasley Dep., 100:23-101:15.
[33] C. Lasley Dep., 55:8-56:5, 58:20-24.

> "(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 the party opposing the motion."[34]

The court must view the evidence in a light most favorable to the nonmoving party.[35] Even the inferences drawn from the evidence and underlying facts must be construed in favor of the nonmoving party, such as inferences drawn from affidavits, depositions, etc.[36] A fact is material when, under the governing substantive law, the facts "might affect the outcome of the suit."[37]

Whether a genuine issue exists is answered by the following inquiry: Does the evidence present "a sufficient disagreement to require submission to a jury" or is it "so one-sided that the party must prevail as a matter of law"?[38] This threshold inquiry determines whether there are "any genuine factual issues that can properly be resolved only by a finder of fact because they may reasonably be resolved in favor of either party."[39]

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[34] *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977). *See Davis v. Loopco Indus., Inc.*, 66 Ohio St.3d 64, 65-66, 609 N.E.2d 144 (1993) (holding same); Civ.R. 56(C).
[35] *Welco Indus. Inc. v. Applied Cos.*, 67 Ohio St.3d 344, 356, 617 N.E.2d 1129 (1993); *Willis v. Frank Hoover Supply*, 26 Ohio St.3d 186, 188, 497 N.E.2d 1118 (1986); *Williams v. First United Church of Christ*, 37 Ohio St.2d 150, 152, 309 N.E.2d 924 (1974).
[36] *Hannah v. Dayton Power & Light Co.*, 82 Ohio St.3d 482, 485, 696 N.E.2d 1044 (1998), citing *Turner v. Turner*, 67 Ohio St.3d 337, 341, 617 N.E.2d 1123 (1993).
[37] *Anderson v. Liberty-Lobby Inc.* 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211 (1986).
[38] Id. at 251-52.
[39] Id. at 250.

The movant bears the burden to show that no genuine issue exists as to any material fact, and it is entitled to judgment as a matter of law.[40] This burden requires the movant to "specifically delineate the basis upon which summary judgment is sought in order to allow the opposing party a meaningful opportunity to respond."[41] If the movant fails to satisfy its initial burden, the motion for summary judgment must be denied.[42]

However, if the movant satisfies this burden, then the nonmoving party has a "reciprocal burden" to set forth specific facts, beyond the allegations and denials in his pleadings, demonstrating that a "triable issue of fact" remains.[43] The duty of the nonmoving party is more than that of resisting the motion's allegations.[44] Instead, this burden requires the nonmoving party to "produce evidence on any issue for which [the nonmoving] party bears the burden of production at trial."[45] The nonmoving party must present documentary evidence of specific facts showing that there is a genuine issue for trial.[46] It may not rely on the pleadings or unsupported allegations.[47]

Under Civ.R. 56(C), the only evidence that may be considered when ruling on a motion for summary judgment is "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if

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[40] *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990); *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).
[41] *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 526 N.E.2d 798 (1988), syllabus.
[42] Id. *See HSBC Mtge. Serve. v. Williams*, 12th Dist. Butler No. CA2013-09-174, 2014-Ohio-3778, ¶ 8 (holding same).
[43] *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996).
[44] *Wells Fargo*, 2013-Ohio-855 at ¶ 25.
[45] (Citation omitted.) *Wing v. Anchor Media Ltd. Of Texas*, 59 Ohio St.3d 108, 570 N.E.2d 1095 (1991), paragraph three of the syllabus; *See Welco Indus., Inc.*, 67 Ohio St.3d at 346 (holding same).
[46] *Williams*, 2014-Ohio-3778 at ¶ 8. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).
[47] Id.

any, timely filed in the action."[48] The trial court maintains the sound discretion to admit or exclude relevant evidence.[49] When a document falls outside the enumerated categories in Civ.R. 56(C), the correct method to introduce the document is to incorporate it by reference into a properly framed affidavit.[50]

Opposing and supporting affidavits must be based on personal knowledge, must set forth facts as would be admissible into evidence, and must affirmatively show that the affiant is competent to testify on the matters in the affidavit.[51] "Personal knowledge" is defined as "[k]nowledge of the truth in regard to a particular fact or allegation, which is original and does not depend on information or hearsay."[52] "Absent evidence to the contrary, an affiant's statement that his affidavit is based on personal knowledge will suffice to meet the requirements of Civ.R. 56(E)."[53] Furthermore, if the affiant does not specifically state that he or she has personal knowledge, "personal knowledge may be inferred from the contents of the affidavit."[54]

By contrast, if certain statements in the affidavit "suggest that it is unlikely that the affiant had personal knowledge" of the facts, then "something more than a conclusory averment that the affiant has personal knowledge would be required."[55]

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[48] *See Wells Fargo*, 2013-Ohio-855 at ¶ 15, citing *State ex rel. Varnau v. Wenninger*, 12th Dist. Brown No. CA2009-02-2010, 2011-Ohio-3904, ¶ 7 ("Civ.R. 56(C) provides an exclusive list of materials that a trial court may consider when deciding a motion for summary judgment.").
[49] *Green Tree Servicing, L.L.C. v. Roberts*, 12th Dist. Butler No. CA2013-03-039, 2013-Ohio-5362, ¶ 18, quoting *U.S. Bank v. Bryant*, 12th Dist. Butler No. CA2012-12-266, 2013-Ohio-3993, ¶ 10.
[50] *Martin v. Central Ohio Transit Auth.*, 70 Ohio App.3d 83, 89, 590 N.E.2d 411 (10th Dist.1990); *Biskupich v. Westbay Manor Nursing Home*, 33 Ohio App.3d 220, 222, 515 N.E.2d 632 (8th Dist.1986).
[51] Civ.R. 56(E); *Wells Fargo v. Smith*, Blue Sky L. Rep. P 75.026, 2013-Ohio-855, ¶ 16 (12th Dist.).
[52] *Wells Fargo*, 2013-Ohio-855 at ¶ 16.
[53] Id., citing *Churchill v. G.M.C.*, 12th Dist. No. CA2002-10-263, 2003-Ohio-4001, ¶ 11.
[54] Id.
[55] Id., quoting *Bank One, N.A. v. Swartz*, 9th Dist. No. 03CA008308, 2004-Ohio-1986, ¶ 14.

Likewise, affidavits that merely set forth legal conclusions or opinions without stating supporting facts are insufficient to satisfy Civ.R. 56(E).[56]

Civ.R. 56(E) provides that "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith." Thus, documents referenced in the affidavit "must be attached to the affidavit."[57] If the affiant "relies" on documents in the affidavit but fails to attach those documents, "the portions of the affidavit that reference those document[s] must be stricken."[58]

Because summary judgment is a procedural device designed to terminate litigation where there is nothing to try, it must be awarded with caution, and doubts must be resolved in favor of the nonmoving party.[59] Summary judgment is inappropriate when the facts are subject to reasonable dispute when viewed in a light favorable to the nonmoving party.[60]

LEGAL ANALYSIS

At common law, it is axiomatic that to establish a negligence claim the plaintiff "must demonstrate that (1) the defendant owed a duty of care to the plaintiff, (2) the

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[56] *Stamper v. Middletown Hosp. Assn.*, 65 Ohio App.3d 65, 69, 582 N.E.2d 1040 (12th Dist.1989).
[57] *Wells Fargo*, 2013-Ohio-855 at ¶ 17, citing Civ.R. 56(E).
[58] Id. at ¶ 16, citing *Third Federal S. & L. Assn. of Cleveland v. Farno*, 12th Dist. No. CA2012-04-028, 2012-Ohio-5245, ¶ 10. *See State ex rel. Varnau v. Wenninger*, 12th Dist. Brown No. CA2009-02-010, 2011-Ohio-3904 (striking portions of affidavit where documents were reviewed and relied upon in drafting affidavit but not attached to the affidavit or served with it).
[59] *Loopco Indus., Inc.*, 66 Ohio St.3d at 66, 609 N.E.2d at 145.
[60] *Mers v. Dispatch Printing Co.*, 19 Ohio St.3d 100, 105-06, 483 N.E.2d 150 (1985).

defendant breached that duty, and (3) the defendant's breach proximately caused the plaintiff to be injured."[61]

Whether the defendant owes a duty to the plaintiff is "fundamental to establishing actionable negligence."[62] Moreover, whether a duty exists is a question of law."[63] "Negligence is never presumed."[64] Instead, it is presumed that each party was exercising ordinary care until this presumption is rebutted by evidence of negligence.[65] Without a duty, "then no legal liability can arise on account of negligence. * * *"[66]

"Although a duty may be established by common law or a legislative enactment, whether a duty exists depends on the foreseeability of the injury."[67] "Only when the injured person comes within the circle of those to whom injury may reasonably be anticipated does the defendant owe him a duty of care."[68]

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[61] *See McLoughlin v. Williams*, 12th Dist. Clermont No. CA2015-02-020, 2015-Ohio-3287, ¶ 8, citing *Johnston v. Filson*, 12th Dist. Clinton No. CA2014-04-007, 2014-Ohio-4758, ¶ 9 (the plaintiff "must demonstrate a duty owed by the defendant to the plaintiff, a breach of that duty, and that the plaintiff's injury proximately resulted from the defendant's breach of duty.").

[62] *McLoughlin*, 2015-Ohio-3287 at ¶ 8, quoting *Uhl v. Thomas*, 12th Dist. Butler No. CA2008-06-131, 2009-Ohio-196, ¶ 10.

[63] *Wall v. Sprague*, 12th Dist. Clermont No. CA2007-05-065, 2008-Ohio-3384, ¶ 11, citing *Midwestern Indemn. Co. v. Wiser*, 144 Ohio App.3d 354, 358 (2001).

[64] *Biery v. Pennsylvania R. Co.*, 156 Ohio St. 75, 99 N.E.2d 895 (1951), at paragraph two of the syllabus. *See Zieger v. Burchwell*, 12th Dist. Clermont No. CA2009-11-077, 2010-Ohio-2174, ¶ 18 ("Further, negligence is never presumed, it must be proven.") (Citation omitted.)

[65] *Biery*, 156 Oho St. at 78. *See Higgins v. Bennet*, 12th Dist. Clinton No. CA00-08-022, 2000 WL 23672, * 3 (March 6, 2000) (holding same).

[66] *Jeffers v. Olexo*, 43 Ohio St.3d 140, 142, 539 N.E.2d 614, 54 Ed. Law Rep. 287 (1989), quoting 70 Ohio Jurisprudence 3d (1986) 53-54, Negligence, Section 13.

[67] *Snider v. Nieberding*, 12th Dist. Clermont No. CA2002-12-105, 2002-Ohio-5715, ¶ 8, citing *Eisenhuth v. Moneyhon*, 161 Ohio St. 367, 119 N.E.2d 440 (1954), paragraph one of the syllabus. *See Jeffers*, 43 Ohio St.3d at 142 (explaining that the existence of a duty is largely dependent upon the foreseeability of the "plaintiff's position"); *Menifee v. Ohio Welding Products, Inc.*, 15 Ohio St.3d 75, 77, 472 N.E.2d 707 (1984), citing *Ford Motor Co. v. Tomlinson*, 229 F.2d 873 (C.A. 1956) ("The existence of a duty depends on the foreseeability of the injury.").

[68] *Jeffers*, 43 Ohio St.3d at 142, quoting *Drew v. Gross*, 112 Ohio St. 485, 489, 147 N.E. 757 (1925). See *Menifee*, 15 Ohio St.3d at 77 ("The test for foreseeability is whether a reasonably prudent person would have anticipated that an injury was likely to result from the performance or nonperformance of an act.").

As to the third element of negligence, proximate cause, "* * * the injury sustained shall be the natural and probable consequence of the negligence alleged; that is, such consequence as under the surrounding circumstances of the particular case might, and should have been foreseen or anticipated by the wrongdoer as likely to follow his negligent act."[69]

Chapter 4511 of the Ohio Revised Code contains provisions that establish a preferential status for drivers or pedestrians who have the right of way.[70] The "right of way" is defined as the "right of a vehicle * * * or pedestrian to proceed uninterruptedly in a lawful manner in the direction in which it or the individual is moving in preference to another vehicle * * * or pedestrian approaching from a different direction into its or the individual's path."[71]

Regarding pedestrians, pursuant to R.C. 4511.48, "[w]here a sidewalk is not available, any pedestrian walking along and upon a highway shall walk only on a shoulder, as far as practicable from the edge of the roadway."[72] "Pedestrians with the statutory right of way have an absolute right to proceed uninterruptedly in the direction in which they are moving and need not look for vehicles violating the right-of-way."[73] While a pedestrian has a right of way to walk upon the shoulder of a roadway as far from the road as possible, if the pedestrian crosses onto the roadway, the pedestrian

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[69] *Jeffers*, 43 Ohio St.3d at 143, quoting *Ross v. Nutt*, 177 Ohio St. 113, 114, 203 N.E.2d 118, 120 (1964).
[70] *Anderson v. Schmidt*, 8th Dist. Cuyahoga No. 99084, 2013-Ohio-3534 citing *Deming v. Osinski*, 24 Ohio St.2d 179, 181, 265 N.E.2d 554 (1970).
[71] R.C. 4511.01(UU).
[72] R.C. 4511.50(B).
[73] *Anderson*, 2013-Ohio-3524 at ¶ 30, citing *Havens v. Precision Strip, Inc.*, 2d Dist. Miami No. 2007 CA 1, 2007-Ohio-4082, ¶ 10.

"shall yield the right-of-way to all vehicles * * * upon the roadway."[74] Furthermore, pedestrians are "prohibited by law from leaving the curb or place of safety and entering the right of way of a motor vehicle."[75]

Regarding the duties of drivers, "[g]enerally, a motor vehicle has the right to proceed uninterruptedly in a lawful manner in the direction in which it is travelling in preference to any vehicle or pedestrian approaching from a different direction into its path."[76] As such, a driver with the right of way does not have a duty to "'look, look effectively and continue to look and otherwise remain alert' * * *."[77] In other words, a "driver need not look for pedestrians violating his right-of-way."[78] Accordingly, the fact that a driver "hits an individual on a roadway does not establish negligence."[79]

Although a driver generally has the right of way and does not have a duty to "look effectively," R.C. 4511.48(E) provides that "[t]his section does not relieve the operator of a vehicle * * * from exercising due care to avoid colliding with any pedestrian upon any roadway."[80] If a driver with the right of way discovers a pedestrian that is "not yielding the right way and has thereby placed himself in a perilous situation, it becomes the duty

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[74] R.C. 4511.50(D).
[75] *Anderson*, 2013-Ohio-3524 at ¶ 36, citing *Joyce v. Rough*, 6th Dist. Lucas No. L-10-138, 2011-Ohio3713, ¶ 16.
[76] *Neu v. Estate v. Nussbaum*, 27 N.E. 3d 906, 2015-Ohio-159, ¶ 17 (12th Dist.), quoting *Higgins*, 2000 WL 23672 at *2. *See Zieger*, 2010-Ohio-2174 at ¶ 18 (holding same).
[77] *Deming*, 24 Ohio St.2d at 181. *See Wall*, 2008-Ohio-3384 at ¶ 14 (finding a driver had no duty to "keep an 'effective look out'" for a pedestrian).
[78] *Neu*, 2015-Ohio-159 at ¶ 17, citing *Higgins*, 2000 WL 23672. *See Wall*, 2008-Ohio-3384 at ¶ 12, citing *Snider v. Nieberding*, 12th Dist. Clermont No. CA2002-12-105, 2005-Ohio-5715 ("With regard to the existence of a duty owed by the driver of a motor vehicle to a pedestrian, this court has previously held that a driver of a vehicle owes no duty of care to a pedestrian who walks into the path of the vehicle in an area not marked by a crosswalk, therefore violating a driver's right-of-way."
[79] *Zieger*, 2010-Ohio-2174 at ¶ 18, citing *Higgins*, 2000 WL 23672 at *3. *See Snider*, 2003-Ohio-5715 at ¶ 12, citing *Dixon v. Nowakowski*, 6th Dist. Lucas No. L-98-1372 (Aug. 27, 1999) (holding same).
[80] R.C. 4511.48(E).

of the former to use ordinary care not to injure the latter after becoming aware of his perilous situation."[81] Thus, the duty to avoid colliding with the pedestrian arises "upon discovering" the "dangerous or perilous situation."[82]

In the case at bar, the defendants argue that summary judgment is appropriate because the evidence demonstrates that the plaintiffs are unable to demonstrate the duty element in their negligence claim. More specifically, the defendants point to deposition and affidavit testimony from the defendant Adams averring that he never left his lane of travel. Because he never left his lane of travel, the defendants posit that this means the plaintiff Christina Lasley must have entered the roadway prior to the time when they collided. Because Mr. Adams maintains he never saw Ms. Lasley before the "thud," the defendants suggest that Mr. Adams never knew there was a perilous situation, and therefore he owed her no duty.

The defendants further assert that the plaintiffs cannot create a genuine issue of material fact concerning whether Ms. Lasley was in the road because she has no recollection of the accident. Finally, for many of the same reasons described above, the defendants also argue that they are entitled to summary judgment because the plaintiffs are unable to show that Adams proximately caused Ms. Lasley's injuries.

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[81] *Timmins v. Russomano*, 14 Ohio St.2d, 236 N.E.2d 665 (1968). *See Snider*, 2003-Ohio-5715 at ¶ 12, citing *Deming*, 24 Ohio St.2d at 180-81 ("[T]he operator of a motor vehicle must exercise due care to avoid colliding with a pedestrian in his right of way upon discovering a dangerous or perilous situation."); *Hawkins v. Shell*, 8th Dist. Cuyahoga No. 72788, 1998 WL 299385, *2 (June 4, 1998), citing *Lumaye v. Johnson*, 80 Ohio App.3d 141, 608 N.E.2d 1108 (1992) ("Ordinarily, one need not look for danger unless there is a reason to expect it.").

[82] *Neu*, 2015-Ohio-159 at ¶ 18, citing *Higgins*, 2000 WL 23672. *See Wallace v. Hipp,* 6th Dist. Lucas No. L–11–1052, 2012-Ohio-623, ¶ 17 ("This duty only arises, however, after the other driver or pedestrian has failed to yield and after the driver with the right of way has realized that there is a clearly dangerous condition in the right of way."); *Wall*, 2008-Ohio-3384 at ¶¶ 13, 15 citing *Deming*, 24 Ohio St.2d 179 (explaining that a "driver is only required to exercise due care to avoid colliding with a pedestrian who is in the driver's right of way once the driver discovers a dangerous or perilous situation," and holding that a driver did not violate a duty of care towards a pedestrian because the driver never saw the pedestrian prior to impact).

In response, the plaintiffs argue that there are multiple pieces of evidence that create a genuine issue of material fact concerning whether Ms. Lasley was in the roadway during the collision. First, the plaintiffs proffer an expert opinion from a traffic reconstructionist who opines that the evidence shows that Ms. Lasley was not in the roadway during the collision. The plaintiffs also argue that, despite Ms. Lasley's memory lapse, there are multiple pieces of evidence that allow for the reasonable inference that she was walking on the shoulder at the time of the collision, including the following: the lack of blood splatter on the roadway, the fact that no other vehicles in front of Mr. Adams had to move to avoid colliding with Ms. Lasley, Ms. Lasley's last memory which was of walking along the shoulder; and the fact that Ms. Lasley would not have had any reason to walk in the roadway. Regarding proximate cause, the plaintiffs also argue that there is ample evidence in the record for reasonable minds to conclude that Mr. Adams proximately caused Ms. Lasley's injuries.

For the plaintiffs to be successful on their negligence claim, they must be able to show that the defendant Adams owed a duty of care to Ms. Lasley. [83] The defendants' motion for summary judgment argues that the plaintiffs cannot satisfy this first negligence element. Whether Mr. Adams owed a duty of care depends on whether Ms. Lasley was struck by Mr. Adams while she was walking along the shoulder of State Route 125, and, if not, whether Mr. Adams saw her in the roadway before the collision. [84]

The defendants have cited to Adams' testimony, his affidavit, and the accident report, all of which establish that Mr. Adams drove exclusively in his lane on the

[83] *See McLoughlin*, 2015-Ohio-3287at ¶ 8 citing *Johnston*, 2014-Ohio-4758 at ¶ 9.
[84] *See Neu*, 2015-Ohio-159 at ¶ 18 citing *Higgins*, 2000 WL 23672.

roadway, in which he had the right of way. These facts lead to an inference that Ms. Lasley must have walked onto the roadway when they collided. The defendants also point to Adams' deposition testimony and affidavit to demonstrate that Mr. Adams never saw Ms. Lasley before the collision. Under these facts, the defendants are entitled to summary judgment as a matter of law if the plaintiffs cannot meet their reciprocal burden of showing a genuine issue of material fact.

In this regard, the plaintiffs have produced several pieces of evidence that collectively show there is a genuine issue of material fact concerning whether Ms. Lasley was walking in the road. The plaintiffs have adduced evidence showing that Ms. Lasley's last memory before the accident was of walking on the shoulder of State Route 125. They have also highlighted deposition testimony from Mr. Adams stating that the vehicles in front of him did not move or swerve in order to avoid colliding with Ms. Lasley. Moreover, the plaintiffs have shown that there was no blood found in the roadway and that Ms. Lasley would not have had any reason to begin walking in the road instead of the shoulder. Furthermore, Adams testified that he was not sure where Ms. Lasley had been walking at the time of the accident. Finally, the plaintiffs submitted an expert opinion that opines that there is no physical evidence that Ms. Lasley had been in the roadway.[85]

Inferring that a party was negligent cannot "arise from mere guess, speculation, or wishful thinking, but rather can arise only upon proof of some fact from which such

[85] *Cf. Neu*, 2015-Ohio-159 at ¶ 31 (the appellant's accident reconstruction expert's opinion failed to create a genuine issue of material fact concerning where the appellant was when she was struck by a vehicle because the expert acknowledged in his affidavit that it was unclear where the accident occurred).

inferences can reasonably be drawn."[86] Although speculation is not permitted, the nonmovant "receives the benefit of all favorable inferences when evidence is reviewed for the existence of genuine issues of material facts."[87] Viewing these multiple pieces of evidence in a light most favorable to the plaintiffs, reasonable minds could conclude that Ms. Lasley was walking along the shoulder of State Route 125 at the time of the collision. In that case, Mr. Adams would not have had the right of way, but rather, Ms. Lasley would have had the right of way. Therefore, there are facts from which reasonable jurors could conclude that the defendant Adams owed Ms. Lasley a duty of care. Because a genuine issue of material fact remains, the defendants are not entitled to summary judgment on the issue of Adams' duty of care.

Finally, the defendants argue that the plaintiffs cannot establish that Adams proximately caused Ms. Lasley's injuries. To the contrary, the court finds that there is sufficient evidence for reasonable minds to conclude that Mr. Adams collided with Ms. Lasley, thus proximately causing her injuries. Adams heard a "thud" while driving, and when he investigated its cause, he discovered Ms. Lasley injured nearby on the shoulder. The truck's fender had been damaged, and the paint from the fender transferred to Ms. Lasley's sweatshirt. Moreover, the accident report concludes that Adams collided with Ms. Lasley. Because reasonable minds can reach more than one conclusion regarding the proximate cause of Ms. Lasley's injuries, the court finds summary judgment is inappropriate.

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[86] *Sollberger v. USA Parking Systems, Inc.*, 8th Dist. Cuyahoga No. 94859, 2011-Ohio-216, ¶ 12, citing *Coleman v. Dave's Supermarket, Inc.*, 8th Dist. Cuyahoga No. 88661, 2007-Ohio-2381,

[87] (Citation omitted.) *Byrd v. Smith*, 110 Ohio St.3d, 2006-Ohio-3455, 850 N.E.2d 47, ¶ 25.

CONCLUSION

For the foregoing reasons, the court finds that the defendants' motion for summary judgment is not well-taken and is hereby denied.

IT IS SO ORDERED.

DATED: _____

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Judge Jerry R. McBride

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Decision/Entry were sent on this _____ day of August 2016 by e-mail to John H. Phillips, at jhp@phillipslawfirm.com, Anthony B. Holman, at abh@phillipslawfirm.com, and George P. Montgomery, at montgomerylawoffice@yahoo.com, Attorneys for the Plaintiffs Christina Lasley, Dana Lasley, and James Lasley, Sr., to Bradley A. Wright, at bwright@ralaw.com, Bradley L. Snyder, at bsnyder@ralaw.com, and Tyler M. Jolley, at tjolley@ralaw.com, Attorneys for the Defendants Terry G. Adams and Dean Transportation, Inc., and by regular U.S. Mail to Heartland Health and Wellness Fund, 7250 Poe Avenue, Suite 300, Dayton, Ohio 45414.

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Judicial Assistant to Judge McBride