

FILED

THE COURT OF COMMON PLEAS  
CLERMONT COUNTY, OHIO

2015 JAN 13 PM 1:14

Mark Mason

Plaintiff

v.

James W. Bills, Jr., et al.

Defendants

CASE NO. 2014 CVC 0521

Judge Haddad

Decision/Entry:

Defendant's Motion for  
Summary Judgment

David J. Smith, of the Smith Law Firm, 120 West Second Street, Suite 510,  
Dayton, OH 45402, for Plaintiff.

Jennifer K. Nordstrom, 11260 Chester Rd., Suite 110, Cincinnati, OH 45246,  
for Defendant James W. Bills, Jr.

Pamela S. Chandler-Hanes, Defendant, 6469 Goshen Rd., Goshen, OH  
45122.<sup>1</sup>

This matter came before the Court upon defendant James W. Bills, Jr.'s motion for summary judgment, filed July 29, 2014. The plaintiff filed a response to the motion, and the defendant James W. Bills Jr. filed a final reply. The parties submitted the motion on the briefs by an agreed entry, filed October 30, 2014.

The Court took the matter under advisement, and now renders the following decision.

**UNDISPUTED FACTS**

On or about September 23, 2011, the plaintiff Mark Mason, a pedestrian, was struck by a vehicle owned by the defendant Pamela S. Chandler-Hanes, and driven by the defendant James W. Bills, Jr. Mr. Mason had been at The Pair of Dice bar, located on State Route 28 in Goshen, Clermont County, Ohio. He had walked across State Route

<sup>1</sup> The Court would note that, as of the filing of this Decision/Entry, the defendant Pamela S. Chandler-Hanes has not been served with the complaint.

28 to the Circle K gas station, and was re-crossing State Route 28 to return to the bar when the collision occurred. The evidence suggests that he was halfway across the road, but not in a crosswalk, when he was struck by the vehicle driven by Mr. Bills, who was traveling approximately 40 mph at the time. Both parties were under the influence when the collision occurred, but a dispute exists as to the relevancy of this particular fact.

### **LEGAL STANDARD**

In considering a motion for summary judgment, the Court should review the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact. **Civ. R. 56(C)**. Summary judgment is proper when: (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, and that conclusion is adverse to the nonmoving party, who is entitled to have the evidence construed most strongly in his favor.

***Harless v. Willis Day Warehousing Co.***, 54 Ohio St.2d 64, 66, 8 O.O.3d 73, 375 N.E.2d 46 (1978). See also ***Zivich v. Mentor Soccer Club, Inc.***, 82 Ohio St.3d 367, 369-370, 1998-Ohio-389, 696 N.E.2d 201. The party requesting summary judgment bears the burden of showing that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. ***Harless*** at 66; ***Dresher v. Burt***, 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264 (1996). “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.” ***DaimlerChrysler Services North America v. Lennington***, 9<sup>th</sup> Dist. No. 05CA0055, 2006-Ohio-1546, ¶8, citing ***Dresher***, at 292-293. In determining whether a genuine issue of material fact exists, the Court must answer the following inquiry:

“Does the evidence present a sufficient disagreement to require submission to a jury or is it so one-sided that one party must prevail as a matter of law?” **Wilson v. Maple**, 12<sup>th</sup> Dist. No. CA2005-08-075, 2006-Ohio-3536, at ¶18. The moving party must specifically point to Civ.R. 56(C) evidence that affirmatively demonstrates that the nonmoving party has no evidence to support its claim. **Dresher** at 293; **Lennington**, at ¶8.

Once the moving party satisfies its burden, “the nonmoving party may not rest on the mere allegations of his pleading, but his response, by affidavit or as otherwise provided in Civ. R. 56, must set forth specific facts showing the existence of a genuine triable issue.” **Mootispaw v. Eckstein**, 76 Ohio St.3d 383, 385, 667 N.E.2d 1197 (1996); **Civ. R. 56(E)**. “An issue of fact exists when the relevant factual allegations in the pleadings, affidavits, depositions, or interrogatories are in conflict.” **Ward v. Oakley**, 12<sup>th</sup> Dist. No. CA2013-03-031, 2013-Ohio-4762, ¶13, citing **Scott v. Kings Island Co.**, 12<sup>th</sup> Dist. No. CA98-04-044, 1999 WL 74585, \*2 (Feb. 16, 1999). “Summary judgment is a procedural device to terminate litigation, so it must be awarded cautiously with any doubts resolved in favor of the nonmoving party.” **Parmore Group v. G&V Investments, Ltd.**, 10<sup>th</sup> Dist. Nos. 05AP-756, 06AP-1106, 2006-Ohio-6986, ¶10. See also **Murphy v. Reynoldsburg**, 65 Ohio St.3d 356, 359, 604 N.E.2d 138 (1992).

Not all arguable facts are material. **Gentry v. Collins**, 12<sup>th</sup> Dist. No. CA2012-06-048, 2013-Ohio-63, ¶12. “A dispute of fact is considered ‘material’ only if it affects the outcome of the litigation.” **Id.** “Additionally, not all disputes of fact create a genuine issue. Instead, a dispute of fact is considered ‘genuine’ if it is supported by substantial evidence that exceeds the allegations in the complaint.” [Citations omitted]. **Id.**

## LEGAL ANALYSIS

A cause of action in negligence has four elements: (1) duty, (2) breach of that duty, (3) proximate cause, and (4) injury. *Strother v. Hutchinson*, 67 Ohio St.2d 282, 285, 423 N.E.2d 467 (1981); *Feldman v. Howard*, 10 Ohio St.2d 189, 193, 226 N.E.2d 564 (1967). The defendant asserts that the plaintiff's claim of negligence must fail because the defendant owed no duty to the plaintiff; therefore the defendant could have breached no legal duty as a result of his actions. The defendant asserts that it was the plaintiff who was negligent, and whose negligence was the sole, direct and proximate cause of the injuries sustained. The defendant further argues that, in Ohio, if the driver discovers that the other party is not yielding the right of way and has placed himself in a perilous position, it becomes the duty of the driver to use ordinary care to avoid injury to the other party after becoming aware of the perilous situation. The defendant contends that he did not breach this duty because he had no opportunity to take evasive action after he found the plaintiff in a perilous situation. He argues that he did not see the plaintiff crossing the road prior to the collision until it was too late to stop. Based upon the foregoing, the defendant contends that he did not breach his duty of ordinary care once he discovered the plaintiff in a perilous situation.

The plaintiff asserts that the defendant's motion for summary judgment should be denied because genuine issues of material fact exist. The plaintiff contends that R.C. 4511.48(E) imposes a duty upon a motor vehicle driver to exercise due care to avoid colliding with pedestrians upon the roadway. The plaintiff also argues that R.C. 4511.21(A), the Assured Clear Distance statute, imposes a duty on motor vehicle drivers to operate the motor vehicle at no greater speed than would permit the driver to bring it to a stop within an assured clear distance ahead of an object, pedestrian, or other

vehicle. The plaintiff contends that it is a question for the jury whether the plaintiff was reasonably discernible at the time of the collision.

In Ohio, a pedestrian who crosses outside a marked crosswalk, or an unmarked crosswalk at an intersection, must yield the right of way to all vehicles upon the roadway. **R.C. 4511.48(A)**. Right of way means “[t]he right of a vehicle, streetcar, trackless trolley, 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, streetcar, trackless trolley, or pedestrian approaching from a different direction into its or the individual’s path.” **R.C. 4511.01(UU)(1)**. However, the operator of the vehicle, streetcar, or trackless trolley is not relieved from exercising due care to avoid colliding with any pedestrian upon any roadway. **R.C. 4511.48(E)**.

These sections confer an absolute right of way upon the driver, qualified only by the requirement that he proceed in a lawful manner. *Deming v. Osinski*, 24 Ohio St.2d 179, 181, 265 N.E.2d 554 (1970); *Snider v. Nieberding*, 12<sup>th</sup> Dist. No. CA2002-12-105, 2003-Ohio-5715, ¶9. A driver need not look for pedestrians or vehicles violating his right of way. *Deming*, at 180-181. However, if the driver of the vehicle discovers that the other object is not yielding the right of way and has placed itself in a perilous position, it becomes the duty of the driver to exercise ordinary care not to injure the other after becoming aware of the perilous situation. *Id*, 182.

In addition, the “assured clear distance” rule applies to create liability when a “discernible” object is ahead of the motorist and within his “directional line of travel.” *DiFederico, Exr. v. Reed*, 21 Ohio App.2d 137, Paragraph 1 of the Syllabus (1969). It makes no difference that the object is a pedestrian. *Id*. The rule is not applicable unless the object is reasonably discernible in time to permit the driver to avoid it. *Id*, at

Paragraph 2 of the Syllabus. To establish a violation of the assured clear distance ahead statute, there must be substantial evidence that (1) the object was ahead of the driver in the driver's lane of travel, (2) the object was stationary or moving in the same direction as the motorist, (3) the object did not suddenly appear in the motorist's path, and (4) the object was reasonably discernible. **Pond v. Leslein**, 72 Ohio St.3d 50, 52, 647 N.E.2d 477 (1995); **Wilson v. Maple**, 12<sup>th</sup> Dist. No. CA2005-08-075, 2006-Ohio-3536, ¶13; **Watson, Executrix v. Midwestern Indemnity Co.**, Clermont App. No. CA97-07-062, 1998 WL 221290, unreported, at \*2 (May 4, 1998), citing **Blair v. Goff-Kirby Co.**, 49 Ohio St.2d 5, 7 (1976). A driver violates the statute if there is evidence establishing all of the elements necessary to constitute a statutory violation. **Pond**, at 52.

Relief from the assured clear distance rule occurs when the assured clear distance is suddenly cut down. **DiFederico**, at 149. The object must enter the driver's path suddenly and without the fault of the driver, and the object must render the driver unable, in the exercise of ordinary care, to avoid the collision. **Erdman v. Mestrovich**, 155 Ohio St. 85, paragraph 2 of the Syllabus (1951). If a person goes unexpectedly in front of a moving vehicle, which is being prudently operated, and the driver is unable, by the exercise of ordinary care, to avoid injury to the pedestrian, then the driver is not liable. See **Markley v. Knutson**, 3<sup>rd</sup> Dist. No. 9-96-29, 1996 WL 546875 unreported, (Sept. 26, 1996) (a child walked into the street in front of a moving vehicle and the driver braked and swerved, attempting to avoid the child, but was unsuccessful); **Hawkins v. Shell**, 8<sup>th</sup> Dist. No. 72788, 1998 WL 289385, unreported (June 4, 1998) (plaintiff crossed four lanes outside of a crosswalk and was struck by the defendant); **Higgins v. Bennett**, 12<sup>th</sup> Dist.No. CA99-08-022, 2000 WL 253672,

unreported (March 6, 2000) (decedent was crossing the street and had crossed safely in front of a tractor trailer, but was struck by the appellee, who was traveling in the opposite direction; the pedestrian was thrown into the tractor trailer and the draft caused decedent to be pulled under it); **Abounader v. Gohlstin**, 8<sup>th</sup> Dist. No. 87513, 2006-Ohio-5923 (pedestrian crossed a four lane street and was struck by the driver's vehicle after the driver had just pulled out of her driveway).

There is no dispute that the plaintiff failed to yield the defendant's right of way at the time of the collision as required by R.C. 4511.48(A), and that he had placed himself in a perilous position. However, this did not relieve the defendant from proceeding in a lawful manner once he became aware of the plaintiff's presence, as required by R.C. 4511.48(E). There is a dispute as to whether the defendant did so since some of the Civ.R. 56 evidence suggests that the defendant was under the influence of a drug of abuse at the time of the collision. Further, there seems to be a genuine dispute as to whether or not the defendant was using his headlights when the collision occurred.

Moreover, there are also genuine issues of material fact remaining relative to a violation of the assured clear distance statute, i.e., R.C. 4511.21(A). Specifically, having considered all of the Civ.R. 56 evidence, there appears to be a genuine dispute as to the third element, i.e., whether the plaintiff suddenly appeared in the defendant's lane of travel, preventing the defendant from stopping in time.

Perhaps the most disputed element under the assured clear distance statute is the fourth element, i.e., whether the plaintiff was reasonably discernible. The defendant has presented evidence suggesting that the investigating officer determined the plaintiff was not wearing clothing that made him discernible, that the defendant could not see him prior to the collision, and that an independent witness who was following the

defendant's vehicle could not see the plaintiff. However, the plaintiff has presented his own affidavit suggesting that he was wearing a white t-shirt and a hat with reflective material, both of which made him reasonably discernible if the defendant was utilizing his headlights.<sup>2</sup>

Consequently, having considered all of the Civ.R. 56 evidence, and having construed it in a light most favorable to the plaintiff, the Court finds that a genuine issue of material fact remains, that reasonable minds can reach differing conclusions, and that the defendant is not entitled to judgment as a matter of law.

The Court would note that the defendant suggests the Court should give the affidavit of the independent witness more weight, and consider it to be more credible, than the self-serving affidavit of the plaintiff. Further, although the investigating officer may have made his own determination as to whether the defendant violated the assured clear distance statute, this is merely his opinion based upon his investigation, experience, and training. However, the issue of credibility is reserved for the trier-of-fact at trial. It is not appropriate for the Court, on a motion for summary judgment, to weigh the credibility of witnesses. See *Estate of New v. Dairy Mart Convenient Stores, Inc.*, 12<sup>th</sup> Dist. No. CA2000-11-097, 2001 WL 792931, unreported, at \*4-5 (July 16, 2001). Instead, the Court must determine only whether genuine issues of fact exist such that the case should be submitted to a jury. In this case, disregarding any arguments relative to credibility, the Court finds that genuine issues of material fact exist, and the matter should be resolved by a trier-of-fact at trial.

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<sup>2</sup> The Court would note that the defendant, in his motion, has only argued that the plaintiff cannot establish the third and fourth elements of the assured clear distance statute. See *Defendant's motion for summary judgment*, filed July 29, 2014, p. 9. The defendant did not argue the first or second element. Since the Court cannot require the plaintiff to respond to an argument that has not been made, the Court will only address those elements argued by the defendant, i.e., the third and fourth elements.

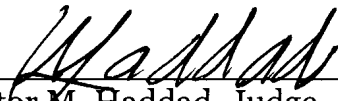
**CONCLUSION**

Based upon the foregoing analysis, and having construed the evidence in a light most favorable to the plaintiff, the Court finds that genuine issues of material fact remain, that reasonable minds can reach differing conclusions, and that the defendant is not entitled to judgment as a matter of law. Therefore, the Court hereby denies the defendant's motion for summary judgment.

The case shall proceed to jury trial on February 9, 2015 as scheduled.

IT IS ORDERED that this decision shall serve as the judgment entry in this matter.

SO ORDERED.

  
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Victor M. Haddad, Judge

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing Decision was served upon the following by e-mail or regular U.S Mail this 13 day of January, 2015.

David Smith

Jennifer Nordstrom

Pamela S. Chandler-Hanes  
6469 Goshen Rd.  
Goshen, OH 45122

  
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Sherry Nagel, Administrative Assistant