

SUPREME COURT OF OHIO

Texler v. D.O. Summers Cleaners & Shirt Laundry Co.

81 Ohio St. 3d 677 (Ohio 1998) · Decided May 13, 1998

OPINION

RESNICK, J.

Alice Robie Resnick, J. The issue presented by this case is whether, on the facts of this case, the trial court should have decided upon a motion for judgment notwithstanding the verdict that as a matter of law the appellant contributed over fifty percent of the negligence involved in the accident and was therefore not entitled to judgment.

The standard for granting a motion for judgment notwithstanding the verdict or in the alternative for a new trial pursuant to Civ.R. 50(B) is the same as that for granting a motion for a directed verdict pursuant to Civ.R. 50(A). *Wagner v. Roche Laboratories* (1996), 77 Ohio St.3d 116, 121, 671 N.E.2d 252, 256, fn. 2, citing *Gladon v. Greater Cleveland Regional Transit Auth.*

(1996), 75 Ohio St.3d 312, 318-319, 662 N.E.2d 287, 294; and *Posin v. A.B.C. Motor Court Hotel, Inc.* (1976), 45 Ohio St.2d 271, 275, 74 O.O.2d 427, 430, 344 N.E.2d 334, 338. Civ.R. 50(A)(4) states: “When a motion for a directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue.” In *Wagner*, we quoted *Strother v. Hutchinson* (1981), 67 Ohio St.2d 282, 284-285, 21 O.O.3d 177, 178-179, 423 N.E.2d 467, 469, in setting forth the standard for deciding a motion for a directed verdict or for a judgment notwithstanding the verdict: “The law in Ohio regarding directed verdicts is well formulated.

In addition to Civ.R. 50(A), it is well established that the court must neither consider the weight of the evidence nor the credibility of the witnesses in disposing of a directed verdict motion. * * * Thus, ‘if there is substantial competent evidence to support the party against whom the motion is made, upon which evidence reasonable minds might reach different conclusions, the motion must be denied.

Kellerman v. J.S. Durig Co. (1964), 176 Ohio St. 320 [27 O.O.2d 241, 199 N.E.2d 562] * * *.’ *Hawkins v. Ivy* (1977), 50 Ohio St.2d 114, 115 [4 O.O.3d 243, 244, 363 N.E.2d 367, 368].” In *Wagner*, we stated that “ ‘[t]he “reasonable minds” test of Civ.R. 50(A)(4) calls upon the court only to determine whether there exists any evidence of *680substantial probative value in support

of [the claims of the party against whom the motion is directed], * * * A motion for a directed verdict raises a question of law because it examines the materiality of the evidence, as opposed to the conclusions to be drawn from the evidence.’ *Ruta v. Breckenridge-Remy Co.* (1982), 69 Ohio St.2d 66, 68-69, 23 O.O.3d 115, 116-117, 430 N.E.2d 935, 938.” *Wagner*, 77 Ohio St.3d at 119-120, 671 N.E.2d at 255-256.

We thus must determine whether reasonable minds could come to the one conclusion that appellant contributed more than fifty percent of the negligence involved in the accident so that, under Ohio’s comparative negligence laws, appellant was not entitled to judgment.

We hold instead that reasonable minds could differ as to the allocation of negligence. In order to establish actionable negligence, the plaintiff must show the existence of a duty, a breach of the duty, and an injury proximately resulting therefrom. *Fed. Steel & Wire Corp. v. Ruhlin Constr. Co.* (1989), 45 Ohio St.3d 171, 173, 543 N.E.2d 769, 772, citing *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St.3d 75, 77, 15 OBR 179, 180, 472 N.E.2d 707, 710; *Di Gildo v. Caponi* (1969), 18 Ohio St.2d 125, 47 O.O.2d 282, 247 N.E.2d 732; and *Feldman v. Howard* (1967), 10 Ohio St.2d 189, 39 O.O.2d 228, 226 N.E.2d 564.

The court of appeals in the case sub judice held as a matter of law that appellant had a duty to take due care in observing hazards in her path (to “watch her step” in effect) that exceeded appellee’s duty to keep dangerous obstructions out of the way of pedestrians.

The existence of a particular party’s duty “ ‘ depends on the foreseeability of the injury. * * * ’ *Menifee v. Ohio Welding Products, Inc.*, supra, at 77, 15 OBR at 180, 472 N.E.2d at 710, citing *Ford Motor Co. v. Tomlinson* (C.A.6, 1956), 229 F.2d 873, 59 O.O. 345; *Gedeon v. E. Ohio Gas Co.* (1934), 128 Ohio St. 335, 190 N.E. 924; see, also, *Hill v. Sonitrol of Southwestern Ohio, Inc.* [(1988), 36 Ohio St.3d 36, 39, 521 N.E.2d 780, 783].

The court in *Menifee*, supra, set forth the following test to be used in order to determine foreseeability: ‘[W]hether a reasonably prudent person would have anticipated that an injury was likely to result from the performance or nonperformance of an act.’ *Menifee*, supra, at 77, 15 OBR at 180, 472 N.E.2d at 710, citing *Freeman v. United States* (C.A.6, 1975), 509 F.2d 626; *Thompson v. Ohio Fuel Gas Co.* (1967), 9 Ohio St.2d 116, 38 O.O.2d 294, 224 N.E.2d 131; *Mudrich v. Standard Oil Co.* (1950), 153 Ohio St. 31, 41 O.O.

117, 90 N.E.2d 859.” *Fed. Steel & Wire Corp.*, 45 Ohio St.3d at 174, 543 N.E.2d at 772-773. The legal issue presented here is whether a reasonably prudent person would have anticipated that an injury would result from walking normally on that sidewalk. This court has held that “[a] pedestrian using a public sidewalk is under a duty to use care reasonably proportioned to the danger likely to be encountered but is not, as a matter of law, required to look constantly

downward *681* **.” *Grossnickle v. Germantown* (1965), 3 Ohio St.2d 96, 32 O.O.2d 65, 209 N. E.2d 442, paragraph two of the syllabus.

This care requires a pedestrian “to use his senses to avoid injury while walking on a sidewalk, but this does not mean that he is required as a matter of law to keep his eyes upon the sidewalk at all times. It may be necessary to keep a lookout for traffic and other pedestrians to avoid collision.” *Griffin v. Cincinnati* (1954), 162 Ohio St. 232, 238, 55 O.O.

118, 120, 123 N.E.2d 11, 15. See, also, *Cash v. Cincinnati* (1981), 66 Ohio St.2d 319, 325-326, 20 O.O.3d 300, 304, 421 N.E.2d 1275, 1279; *Burge v. Pepsi-Cola Bottling Co. of Cincinnati* (1971), 26 Ohio St.2d 237, 55 O.O.2d 478, 271 N.E.2d 273, syllabus, and 26 Ohio St.2d at 241-242, 55 O.O.2d at 480, 271 N.E.2d at 275. More recently, this court has continued to hold that the question of whether the contributory negligence of a plaintiff is the proximate cause of the injury is an issue for the jury to decide pursuant to the modern comparative negligence provisions of R.C.

2315.19(A)(1). *Junge v. Brothers* (1985), 16 Ohio St.3d 1, 4, 16 OBR 254, 256, 475 N.E.2d 477, 480. See, also, *Cash*, 66 Ohio St.2d at 326, 20 O.O.3d at 304, 421 N.E.2d at 1280. After construing the evidence most strongly in favor of appellant (the party against whom the motion for judgment notwithstanding the verdict was directed), we find that reasonable minds could differ as to the proper distribution of negligence between the parties.

Testimony indicated that the propped-open service door blocked at least half the width of the sidewalk and that the bucket used to prop open the door contained protruding concrete blocks that could cause serious injuries.

Although appellant testified that she did not actually see the concrete bucket, she stated that she was walking at a normal or a slower-than-normal pace that day and that she was taking due care as she walked, looking straight ahead, rather than down at the ground.

Thus, there is adequate evidence in the record of substantial probative value that supports the jury’s finding that appellant was taking the proper amount of care to avoid obstructions and that appellee was one hundred percent negligent in the manner by which the bucket of concrete propped open the door, and that this negligence proximately caused the accident.

We therefore reverse the judgment of the court of appeals on the issue addressed in this opinion. We remand this cause to the court of appeals for that court to review the remaining assignments of error raised by both parties below, which were found to be moot and not addressed. Judgment reversed and cause remanded. Douglas, F.E. Sweeney and Pfeifer, JJ., concur. *682Moyer, C.J., Cook and Lundberg Stratton, JJ., dissent.