Weinstein v. Anselmo's Landscape and Design

1996 | Cited 0 times | Ohio Court of Appeals | November 21, 1996

ACCELERATED DOCKET

JOURNAL ENTRY AND OPINION

PER CURIAM

JUDGMENT: AFFIRMED.

This cause came to be heard upon the accelerated calendar pursuant to App.R. 11 and Loc.R. 25, the record from the Cuyahoga County Court of Common Pleas, and the briefs of counsel. Gregg A. Weinstein, et al., plaintiffs-appellants, appeal a summary judgment entered in favor of Anselmo's Landscape & Design, et al., defendants-appellees.

On July 10, 1994, Michael and Margaret Anselmo, defendants- appellees, drove to Eastgate Mall in Mayfield Heights, Ohio. Since the couple wanted to purchase patio furniture and since they traveled with their two children, defendants-appellees drove two vehicles: the family car and Michael Anselmo's pick-up truck he used in his landscaping business.

After they purchased a patio furniture set, Michael Anselmo loaded the furniture into the bed of the pick-up truck. Although there were six pieces of light-weight furniture loaded in the bed of his truck, he only used one bungee cord to secure the load.

Michael Anselmo drove back home down Mayfield Road. Margaret Anselmo followed three to four car lengths behind him in the family car. When the pick-up truck reached a rough portion of the road, a patio chair fell out of the bed. Margaret Anselmo slammed on her brakes to avoid hitting the chair and skidded approximately 60-70 feet. Her car stopped approximately ten feet short of the chair.

Gregg Weinstein, plaintiff-appellant, was driving with his wife and child directly behind Margaret Anselmo. When he saw Margaret Anselmo's vehicle begin skidding, he braked to slow his car down and tried to maneuver around the vehicle. Although he succeeded in avoiding Anselmo's vehicle, the Weinstein's vehicle hit a curb on the side of the road, was thrown onto a tree lawn, and hit a tree. All three Weinsteins sustained severe injuries. Michael Anselmo was subsequently cited and fined for allowing the chair to fall out of the bed of the pick-up truck.

On December 16, 1994, the Weinsteins, plaintiffs-appellants, brought suit against Anselmo's

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Landscape & Design, Michael Anselmo and Margaret Anselmo for injuries sustained in the July 10, 1994 accident. All three defendants moved for summary judgment. On March 19, 1996, the trial court granted Anselmo's Landscaping & Design and Margaret Anselmo's separate motions for summary judgment.

On April 17, 1996, plaintiffs-appellants and Michael Anselmo entered into a stipulation for dismissal and the court entered an order dismissing the action against Michael Anselmo with prejudice. On May 10, 1996, the Weinsteins, plaintiffs-appellants, timely filed this appeal seeking review of the trial court's order granting Margaret Anselmo's motion for summary judgment.

Gregg A. Weinstein, et al., plaintiffs-appellants, state as their sole assignment:

THE TRIAL COURT ERRED IN GRANTING DEFENDANT MARGARET ANSELMO'S MOTION FOR SUMMARY JUDGMENT, AS A GENUINE ISSUE OF MATERIAL FACT EXISTED UPON WHICH REASONABLE MINDS COULD DIFFER AS TO WHETHER MARGARET ANSELMO WAS ENGAGED IN A JOINT ENTERPRISE WITH HER HUSBAND.

Plaintiffs-appellants argue the trial court erred in granting summary judgment for Margaret Anselmo, defendant-appellee, as there exist genuine issues of material fact concerning: 1) her individual negligence in helping create a hazard which proximately caused injuries to plaintiffs-appellants and 2) the negligence of Mr. Anselmo being imputed to Margaret Anselmo as they were involved in a joint enterprise.

Civ.R. 56(C) provides that before summary judgment may be granted, the court must determine that (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. Osborne v. Lyles (1992), 63 Ohio St.3d 326.

A motion for summary judgment forces the non-moving party to produce evidence on issues for which that party bears the burden of production at trial. Wing v. Anchor Media, Ltd. of Texas (1991), 59 Ohio St.3d 108 (syllabus). The non-movant must also present specific facts and may not rely merely upon the pleadings or upon unsupported allegations. Shaw v. Pollack & Co. (1992), 82 Ohio App.3d 656. When a party moves for summary judgment supported by evidentiary material of the type and character set forth in Civ.R. 56(E), the opposing party has a duty to submit affidavits or other material permitted by Civ.R. 56(C) to show that there is a genuine issue for trial. Harless v. Willis Day Warehousing Co. (1978), 54 Ohio St.2d 64.

In Dresher v. Burt (1996), 75 Ohio St.3d 280, the Ohio Supreme Court recently discussed the proper standard to be applied when reviewing summary judgment motions. The court found as follows:

Again, we note that there is no requirement in Civ.R. 56 that any party submit affidavits to support a motion for summary judgment. See, e.g., Civ.R. 56(A) and (B). There is a requirement, however, that a moving party, in support of a summary judgment motion, specifically point to something in the record that comports with the evidentiary materials set forth in Civ.R. 56(C). Id. at 298.

This court's analysis of an appeal from a summary judgment is conducted under a de novo standard of review. See Maust v. Bank One Columbus, N.A. (1992), 83 Ohio App.3d 103, 107; Howard v. Willis (1991), 77 Ohio App.3d 133. No deference is given to the decision under review, and this court applies the same test as the trial court. Bank One of Portsmouth v. Weber (Aug. 7, 1991), Scioto App. No. 1920, unreported.

It is well established that in order to establish actionable negligence, one must establish the existence of a duty, a breach of that duty, and an injury resulting proximately therefrom. Menifee v. Ohio Welding Products, Inc. (1984), 15 Ohio St.3d 75; DiGildo v. Caponi (1969), 18 Ohio St.2d 125. In the case sub judice, both of plaintiffs-appellants' assigned errors argue Margaret Anselmo, defendant-appellee, was negligent. The negligence, whether characterized by plaintiffs-appellants as independent or imputed, is a product of the relationship she shared with her husband as members of a joint enterprise and/or joint venture.

Initially, we note the person alleging joint enterprise for the purpose of imputing negligence has a heavy burden of proof since the courts do not favor the doctrine. See O'Donnell v. Korosec (Nov.27, 1992), Geauga App. No. 91-G-1659, unreported, citing, Lester v. John R. Jurgensen Co. (1968), 400 F.2d 393, 396.

A joint enterprise and/or venture has been defined as:

"*** [A]n association of persons with intent, by way of contract, expressed or implied, to engage in and carry out a single business adventure for joint profit, for which purpose they combine their efforts, property, money, skill and knowledge, without creating a partnership, and agree that there shall be a community of interest among them as to the purpose of the undertaking, and that each coadventurer shall stand in the relation of principal, as well as agent, as to each of the other coadventurers ***." Al Johnson Constr. Co. v. Kosydar (1975), 42 Ohio St.2d 29, paragraph one of the syllabus, quoting Ford v. McCue (1955), 163 Ohio St. 498. See, also, Silver Oil Co. v. Limbach (1989), 44 Ohio St.3d 120; Kahle v. Turner (1979), 66 Ohio App.2d 49.

From a review of the case law, it is apparent for purposes of negligence claims, a "joint venture" is a type of business relationship created for profit and/or gain. See, e.g., Clifton v. Van Dresser Corp. (1991), 73 Ohio App.3d 202. We find that plaintiffs-appellants have failed to put forth sufficient evidence from which reasonable minds could conclude there existed a "joint enterprise" between Margaret Anselmo and her husband in either the loading of the pick-up truck or the driving of the vehicle.

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Rather, from a review of the evidence presented to the trial court, it is clear that Michael and Margaret Anselmo were merely acting as husband and wife. To hold otherwise would lead to a misapplication of the law in Ohio regarding joint enterprises and/or ventures.

As there exists no joint enterprise, there can be no duty from which Margaret Anselmo can be held independently negligent. Nor can negligence be imputed to Margaret Anselmo from the actions of her husband. The trial court did not err in granting defendants- appellees' motion for summary judgment.

Judgment affirmed.

It is ordered that appellees recover of appellants their costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Common Pleas 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.

DAVID T. MATIA, PRESIDING JUDGE

TERRENCE O'DONNELL, JUDGE

TIMOTHY E. McMONAGLE, JUDGE