STATE OF OHIO) IN THE COURT OF COMMON PLEAS
) SS.
COUNTY OF CUYAHOGA) Civil Case No. 485638

JOURNAL ENTRY AND OPINION

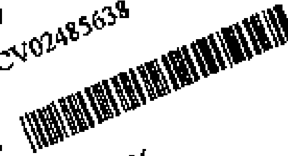
JOHN HORVATH, et al.

Plaintiffs,

vs.

CITY OF BROADVIEW HEIGHTS, et al.

Defendants.



Kathleen Ann Sutula, J:

IT IS SO ORDERED:

Defendant City of Broadview Heights (hereinafter "Broadview Hts.") moves this Court to grant summary judgment in its favor. Broadview Hts. filed its brief, asserting that there are no genuine issues of material fact, on June 2, 2003, and filed a notice of supplemental authority on June 11, 2003. Plaintiffs John Horvath ("Horvath") and his wife Carol filed their brief in opposition on June 30, 2003.

In the Complaint against Broadview Hts., the Plaintiffs seek relief on the grounds that Broadview Hts. negligently spread a substance known as "hydromulch" on the Plaintiffs' tree lawn and the adjacent curb. Having construed the facts of the case in the light most favorable to the non-moving party, the Court sets forth the facts, for purposes of the motion for summary judgment, as follows.

In the morning of April 24, 2002, Horvath, a resident of Broadview Hts., was mowing his lawn. The weather on that day was sunny and dry, just as it had been for the past few days. *See* Horvath Depo., pp.36-37. Prior to the time that Horvath began

mowing on April 24, employees of Broadview Hts. had spread hydromulch on the tree lawn in front of Horvath's home. *See* Horvath Depo., pp.19-20.

As he cut his grass, Horvath came "down the property line...stop[ped] on the corner and [made] a quick right" on the tree lawn. *See* Horvath Depo., pp.13-14. The tree lawn, which at that time "came down and dropped away there," was covered with the hydromulch. *See* Horvath Depo., pp. 19, 23-24. Upon making his turn, Horvath slipped and injured his ankle. *See* Horvath Depo., p. 29.

I. Summary Judgment Standard

When ruling on motions for summary judgment, Rule 56 (C) of the Ohio Rules of Civil Procedure guides the Court. Rule 56(C) permits the Court to grant summary judgment when (1) there are no genuine issues of material fact; (2) reasonable minds can come to only one conclusion, and the conclusion adversely affects the non-moving party; and (3) the moving party is entitled to judgment as a matter of law. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 65-66, 365 N.E.2d 46; see also Civ.R. 56(C); *Holliman v. All State Ins. Co.* (1998), 86 Ohio St.3d 414, 715 N.E.2d 532; *Bostic v. Connor* (1988), 37 Ohio St.3d 144, 524 N.E.2d 881.

Since summary judgment is such a drastic measure, cutting off a party's right to present its case at trial, courts should grant summary judgment motions sparingly. *Dupler v. Mansfield Journal* (1980), 64 Ohio St.2d 116, 120, 413 N.E.2d 1187; see also *Viock v. Stowe-Woodward Co.* (Erie 1983), 13 Ohio App.3d 7, 14-15, 467 N.E.2d 1378. By the same token, however, courts can, and should, grant summary judgment motions when the case has been fully developed by discovery and the record demonstrates that,

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construing all the facts and inferences in the non-movant's favor, the non-moving party would not be entitled to judgment as a matter of law. *Dupler*, 64 Ohio St.2d at 120.

In order for the Court to grant summary judgment, the moving party has the burden of demonstrating through the evidence detailed in Civ.R. 56(C) that the opposing party cannot establish any elements of its claims.[1] *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264. If the movant fulfills its burden, the burden will then shift to the non-moving party to produce evidence to establish the elements of its claims. *Id.*, 75 Ohio St.3d at 282. If the non-movant fails to satisfy its burden, a court's granting of summary judgment is not only proper- it is mandated. *Celotex Corp. v. Catrett* (1986), 477 U.S. 317.

II. Horvath's Claim of Negligence

Horvath's Complaint against Broadview Hts. is premised upon the allegation that Broadview Hts.' employees were negligent in spreading the hydromulch on Horvath's tree lawn. In order to prevail on this claim, Horvath needs to establish that Broadview Hts. owed a duty to him, Broadview Hts. breached that duty, and the breach of that duty was the proximate cause of Horvath's injuries. See *Jeffers v. Olexo* (1989), 43 Ohio St.3d 140, 142, 539 N.E.2d 614.

In examining the duty imposed upon Broadview Hts., the Court notes that the Ohio Revised Code provides that a municipality may be liable for negligence when the municipality fails to keep sidewalks in repair and free from nuisance. *See* O.R.C. §723.01; O.R.C. §2744.02(B)(3). Although the Ohio General Assembly did not specifically include tree lawns in the purview of Section 723.01, Ohio courts have since

[1] The evidence to be used includes the pleadings, depositions, interrogatory answers, admissions, affidavits, transcripts of evidence, and written fact stipulations. Civ.R. 56(C).

extended the scope of this section to include tree lawns. See *Joseph v. Portsmouth* (1975), 44 Ohio St.2d 155; *Martin v. City of Warren* (11th Dist. 2002), 2002-Ohio-2116; *Zupancic v. Cleveland* (Cuyahoga 1978), 58 Ohio App.2d 61. While a city does have a duty of reasonable care to maintain its streets, sidewalks, and tree lawns in a safe condition, a municipal corporation is not expected to insure the safety of all its thoroughfares. *Taylor v. City of Cincinnati* (1944), 143 Ohio St. 426, 447, 55 N.E.2d 724; see also *Walker v. City of Parma* (Cuyahoga 1991), No. 60540, 1991 WL 95090.

A municipality's liability, therefore, is dependent on one of two things. The first is whether the municipality actually created the nuisance. In the alternative, liability may attach when the municipality had actual or constructive notice of the nuisance before the accident, and then failed to alleviate the nuisance. *Cleveland v. Amato* (1931), 123 Ohio St. 575, 176 N.E. 227, paragraph one of the syllabus; see also *Ruwe v. Bd. of Springfield Twp. Trustees* (1987), 29 Ohio St.3d 59, 60, 505 N.E.2d 957; *Wilke v. City of Brookpark* (Cuyahoga App. 1999), No. 74636, 1999 WL 1204882.

The issue to determine, therefore, is whether or not Broadview Hts. actually created a nuisance by spreading the hydromulch. A nuisance in these circumstances is defined as "those conditions which render a street or sidewalk unsafe for usual and ordinary modes of travel." *Palko v. Elyria* (Lorain 1993), 86 Ohio App.3d 211, 215. Merely creating the condition, however, is insufficient to attach liability. Instead, Broadview Hts. could be liable for spreading the hydromulch if there "was a reasonable apprehension of a potential danger." *Weber v. Condren* (Cuyahoga 1995), No. 68268, 1995 WL 558899, quoting *Franks v. Lopez* (1994), 69 Ohio St.3d 345, 349.

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In this case, there is no dispute that Broadview Hts. created the condition on the tree lawn. *See e.g.*, Broadview Hts.' Answers to Interrogatories, #4. The spreading of the hydromulch, however, does not constitute a nuisance under Ohio law.

An inspection of Exhibits One and Two attached to Broadview Hts.' Motion for Summary Judgment makes it clear that a reasonable mind could not come to the conclusion that the hydromulch presented a potential danger.[2] As such, Broadview Hts. lacked notice of the nuisance.

Hydromulch, and other similar products, are routinely used "to cover big areas of grass." *See* Horvath Depo., p.19. Despite hydromulch's usage, there is a lack of evidence, outside of Horvath's own personal experience, that hydromulch is a potentially dangerous nuisance. If Broadview Hts. were to be liable when there is no reasonable apprehension of danger, any municipality could be liable for injuries resulting from even the most mundane, routine, and harmless tasks.

Moreover, the condition of the tree lawn, from the pictures provided, presents a situation where the open-and-obvious doctrine is controlling. As clarified recently by the Ohio Supreme Court, this Court, in employing the open-and-obvious doctrine, must analyze "the nature of the dangerous condition itself...it is the fact that the condition itself is so obvious that it absolves the property owner from taking any further action to protect the plaintiff." *Armstrong v. Best Buy Co., Inc.* (2003), 2003 Ohio 2573, at ¶13.

In *Armstrong*, the plaintiff was injured when he tripped over a shopping cart guardrail. The plaintiff admitted at his deposition that if "he had been looking down, he would have seen the guardrail." *Id.*, 2003 Ohio 2573, at ¶16. The Court, upon

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[2] It is worth noting that the Plaintiff admitted at his deposition that the pictures provided by Broadview Hts. accurately portray the condition of the tree lawn at the time of the accident. *See* Horvath Depo., p. 21.

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reviewing photographs of the scene, "[found] that as a matter of law, the rail in question was visible to all persons entering and exiting the store. Thus, the rail presented an open-and-obvious hazard." *Id.*

The situation presented by Horvath's slip and fall is not all that distinguishable from that of *Armstrong*. While Horvath does own the tree lawn, and may have a lower expectation for a hazard being found there, Broadview Hts. does have a duty to maintain the tree lawn. As previously pointed out, Exhibits One and Two of Broadview Hts.' motion show that the hydromulch created a condition that was open-and-obvious. The hydromulch was a different color than the rest of the tree lawn and could not be mistaken for grass, especially when it is recalled that this accident happened in broad daylight on a sunny morning in April 2002. Horvath himself, when asked if he would have seen the hydromulch if he had looked for it, answered that "had [he] specifically gone and looked out in the yard for it I probably would have." *See* Horvath Depo., p.31. There is no genuine issue of material fact with respect to this claim.

III. The Comparative Negligence Issue

As there was no duty on behalf of Broadview Hts. by virtue of the open-and-obvious, an analysis by this Court of the parties' fault is not ripe. "[W]here there is no duty there is no liability, and therefore no fault to be compared." *Armstrong*, 2003 Ohio 2573, at ¶11, quoting *Bucheleres v. Chicago Park Dist.* (1996), 171 Ill.2d 435, 447.

IV. Conclusion

While there is no doubt that Horvath suffered an injury, this is a case where the law does not provide a remedy for the Plaintiff. While Newton's Laws of Physics state that for every action there must be an equal and opposite reaction, there is not a

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corresponding rule of law that states that for every accident there must be a party to blame. See e.g., *S.S. Kresge Co. v. Fader* (1927), 116 Ohio St. 718, 724; *Bennett v. Revco Drug Stores, Inc.* (9th Dist. 1997), 1997 WL 625480; *Fortesque v. Rini Rego Supermarkets, Inc.* (Cuyahoga 1996), No. 69293.

It is, therefore, ORDERED, ADJUDGED, and DECREED:

For the reasons previously stated, Broadview Hts.' Motion for Summary Judgment is well taken. After construing the facts in the light most favorable to the non-moving party, there are no genuine issues of material facts. Reasonable minds, therefore, can reach only one conclusion in this matter. For good cause shown, Broadview Hts. is entitled to judgment as a matter of law.

The Court finds that there is no just cause for delay.

Costs to Plaintiff. FINAL.

DATE: July 17th, 2003

KATHLEEN ANN SUTULA, JUDGE

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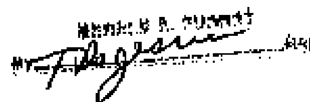

CERTIFICATE OF SERVICE

A copy of the foregoing Journal Entry and Opinion has been sent via regular U.S. mail on this 17th day of July, 2003, to the following:

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