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IN THE
COURT OF APPEALS OF INDIANA

ROBERT BULES AND BRIAN BULES,	)	
	)	
Appellants-Plaintiffs,	)	
	)	
vs.	)	No. 50A03-0812-CV-620
	)	
MARSHALL COUNTY AND MARSHALL COUNTY HIGHWAY DEPARTMENT,	)	
	)	
Appellees-Defendants.	)	

APPEAL FROM THE MARSHALL SUPERIOR COURT
The Honorable Curtis Palmer, Special Judge
Cause No. 50D01-0701-CT-1

July 13, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Robert Bules appeals the trial court's grant of summary judgment in favor of Marshall County. For our review, Bules raises two issues, one of which we find dispositive: whether the trial court erred when it granted summary judgment in favor of Marshall County. Concluding summary judgment is not appropriate, we reverse and remand.

Facts and Procedural History

On January 15, 2005, at around 6:30 in the morning, Bules drove his tractor-trailer southbound on King Road in Marshall County. As he crested a hill, Bules saw deep water covering the road at the bottom of the hill just past the intersection of King Road and Plymouth-Goshen Trail. About this same time, Bules saw a high water warning sign. Bules attempted to slow his truck as he came down the hill, but he felt the truck start to slide and jack-knife. As a result, Bules attempted to drive through the water. As his truck exited the other side of the water, it began to slide, ultimately rolling onto its side. Bules testified that he only saw one warning sign in the southbound direction, which was located after the crest of the hill very close to the water.

Marshall County had received numerous reports of high water blocking King Road at the site of Bules's accident, beginning around 12:30 in the morning. In response, Richard Wallace, a Marshall County employee, placed warning signs near the water. Wallace testified that he placed two signs in the southbound direction, one near the crest of the hill approximately 1000 feet from the intersection of King Road and Plymouth-Goshen Trail and another approximately 1000 feet from the water.

On January 11, 2007, Bules filed a complaint alleging that Marshall County failed to properly warn the public of the danger of high water on King Road. Marshall County filed a motion for summary judgment claiming immunity based on the Indiana Tort Claims Act, Indiana Code section 34-13-3-3(3) (the "Act"). After Bules filed his response in opposition to summary judgment, Marshall County moved to strike two paragraphs of Bules's affidavit and a letter sent to Bules by a claims adjuster from Marshall County's insurer. The trial court granted Marshall County's motion to strike and granted summary judgment in favor of Marshall County. Bules now appeals.

Discussion and Decision

I. Standard of Review

We review a grant of summary judgment de novo and employ the same standard as the trial court. Cox v. N. Ind. Pub. Serv. Co., 848 N.E.2d 690, 695 (Ind. Ct. App. 2006). Summary judgment is only appropriate when the designated evidence shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C). We consider only the evidence designated to the trial court, and we construe all facts and reasonable inferences from those facts in the favor of the non-moving party. Cox, 848 N.E.2d at 965.

II. Statutory Immunity

The trial court granted summary judgment in favor of Marshall County "based upon the immunity granted to governmental entities for temporary conditions of roadways resulting from the weather pursuant to [the Act]." Appellant's Appendix at 8. Therefore, the

threshold question in this case is whether Marshall County is entitled to statutory immunity. Whether Marshall County is entitled to immunity is a question of law to be decided by the court, and Marshall County bears the burden of establishing immunity. Catt v. Bd. of Comm'rs of Knox County, 779 N.E.2d 1, 3 (Ind. 2002).

The law is well settled that "a governmental entity has a common law duty to exercise reasonable care and diligence to keep its streets and sidewalks in a reasonably safe condition for travel." Id. However, under the Act, a governmental entity "is not liable if a loss results from … the temporary condition of a public thoroughfare … that results from weather." Ind. Code § 34-13-3-3(3). That is not to say the Act provides immunity every time an accident occurs during bad weather. Catt, 779 N.E.2d at 4. Rather, the court must determine whether the accident was the result of the bad weather or some other factor. Id. For example, if a party can demonstrate that his injury is due to negligence rather than the temporary condition of the road due to the bad weather, then the governmental entity may be liable for the party's loss. Id.

This case is easily distinguishable from Catt. In Catt, the plaintiff was injured when his car drove into a ditch going across the road because a culvert had been washed out by heavy rains. Id. at 2. Despite the fact that this particular culvert had been washed out on many occasions over the years, our supreme court held that this particular wash-out was a temporary condition caused by the weather and granted the county immunity under the Act. Id. at 5-6. Here, Bules does not argue the poor design or construction of the road caused it to flood or that Marshall County should have removed the water or ice. Rather, Bules argued

that Marshall County negligently placed the warning signs too close to the standing water such that he was unable to stop his truck in time to avoid hitting the water.

There is conflicting evidence regarding the number of signs placed on the southbound approach to the water and the exact placement of the signs. Indeed, the trial court acknowledges this fact in its findings, "Certainly a genuine issue of material fact exists as to whether the placement of the 'High Water' signs in this situation by [Marshall County] was or was not negligent." However, the trial court incorrectly concludes that the Act's grant of statutory immunity prevents Bules from trying this issue.

Viewing the facts in a light most favorable to Bules, he has designated evidence that Marshall County knew of the flooding well in advance but placed the warning signs too close to the hazard to allow motorists to avoid an accident. Accepting this evidence as true, Marshall County would not be subject to immunity under the Act. See Bd. of Comm'rs of Steuben County v. Angulo, 655 N.E.2d 512, 513-14 (Ind. Ct. App. 1995) (county not entitled to statutory immunity based on a temporary condition resulting from weather where county failed to place appropriate markings and warning signs near a sharp curve despite fact that accident occurred because plaintiff could not see the curve through a dense fog); see also Jacobs v. Bd. of Comm'rs of Morgan County, 652 N.E.2d 94, 100 (Ind. Ct. App. 1995) (county not entitled to statutory immunity based on discretionary decisions under similar circumstances to Angulo). As a result, the trial court erred when it granted summary

judgment in favor of Marshall County, and we reverse the trial court's judgment and remand this case for further proceedings.[1]

Conclusion

A genuine issue of material fact exists as to whether Marshall County negligently placed the high water warning signs. The Act does not provide Marshall County immunity for the negligent placement of warning signs even if the resulting accident took place during bad weather conditions. Therefore, the trial court erred when it granted summary judgment in favor of Marshall County.

Reversed and remanded.

DARDEN, J., and BAILEY, J., concur.

[1] Because sufficient evidence exists to preclude summary judgment without considering the evidence struck by the trial court, we need not address Bules's argument that the trial court improperly struck the evidence.