[Cite as *Liegel v. Bainum*, 2011-Ohio-6022.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLERMONT COUNTY

JANET LIEGEL, et al.,	:	
Plaintiffs-Appellees,	:	CASE NO. CA2011-06-049
	:	O P I N I O N
- vs -	:	11/21/2011
NATHAN S. BAINUM,	:	
Defendant-Appellant.	:	

CIVIL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2010 CVH 01749

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HENDRICKSON, J.

{¶1} Defendant-appellant, Nathan S. Bainum, appeals the decision of the Clermont County Court of Common Pleas granting summary judgment in favor of plaintiffs-appellees, Janet Liegel and State Farm Mutual Automobile Insurance Company (State Farm).[1] For the reasons that follow, we affirm the decision of the trial court.

1. Pursuant to Loc.R. 6(A), we sua sponte remove this appeal from the accelerated calendar.

{¶2} On July 29, 2009, Bainum and Liegel were involved in a car accident. The record indicates that Liegel was traveling northbound on Hopper Hill Road near the intersection with State Route 125. Bainum attempted to turn left out of the parking lot of a Smokey Bones restaurant onto Hopper Hill Road; however, his vehicle collided with Liegel's 2007 BMW X3.

{¶3} At the time of the accident, Liegel's BMW was insured by State Farm. Damage occurred to the front driver side of the vehicle which resulted in a total loss. On August 23, 2010, Liegel and State Farm filed a complaint against Bainum asserting his negligence caused damage to her vehicle. Bainum filed his answer, denying any negligence. State Farm and Liegel moved for summary judgment claiming there was no genuine issue of material fact as to Bainum's negligence. They claimed Bainum violated R.C. 4511.44(A) by depriving Liegel of her absolute right of way when he entered her path, such action constituted negligence, and this negligence caused the accident. The trial court found there was no genuine issue of material facts and granted the motion for summary judgment. Bainum now appeals, asserting two assignments of error. As the assignments of error are related, for ease of discussion, we will address them together.

{¶4} Assignment of Error No. 1:

{¶5} "TRIAL COURT INCORRECTLY GRANTED SUMMARY JUDGMENT IN FAVOR OF PLAINTIFF WHEN GENUINE ISSUES OF MATERIAL FACT REMAIN."

{¶6} Assignment of Error No. 2:

{¶7} "TRIAL COURT FAILED TO CONSTRUE THE EVIDENCE IN FAVOR OF THE PARTY AGAINST WHOM THE MOTION FOR SUMMARY JUDGMENT WAS MADE."

{¶8} In his first assignment of error, Bainum challenges the trial court's determination that there was no genuine issue of material facts to be resolved. Bainum claims that his affidavit and answers to interrogatories created genuine issues of material fact regarding

whether Liegel was negligent in the accident. More specifically, Bainum asserts that Liegel forfeited her right of way status because she was not proceeding in a lawful manner. We find no merit to this argument.

{¶9} This court's review of a trial court's ruling on a summary judgment motion is de novo, which means that we review the judgment independently and without deference to the trial court's determination. *Simmons v. Yingling,* Warren App. No. CA2010-11-117, 2011-Ohio-4041, ¶18, citing *Burgess v. Tackas* (1998), 125 Ohio App.3d 294, 296. We utilize the same standard in our review that the trial court uses in its evaluation of the motion.

{¶10} Under Civ.R. 56, summary judgment is appropriate 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, said party being entitled to have the evidence construed most strongly in his favor." *Simmons* at ¶19, quoting *Zivich v. Mentor Soccer Club, Inc.,* 82 Ohio St.3d 367, 369-370, 1998-Ohio-389. The party moving for summary judgment has the initial burden of producing some evidence that affirmatively demonstrates the lack of a genuine issue of material fact. *Dresher v. Burt,* 75 Ohio St.3d 280, 292-93, 1996-Ohio-107. The nonmoving party must then rebut the moving party's evidence with specific facts showing the existence of a genuine triable issue; it may not rest on the mere allegations or denials in its pleadings. Id.; Civ.R. 56(E). A disputed fact is "material" if it affects the outcome of the litigation, and it is "genuine" if it is supported by substantial evidence that exceeds the allegations in the complaint. *Morris v. Fields Family Ents., Inc.*, Warren App. No. CA2010-10-102, 2011-Ohio-3433, ¶9, citing *Myers v. Jamar Ent.* (Dec. 10, 2001), Clermont App. No. CA2001-06-056, at 4.

{¶11} It is fundamental that a claim of negligence requires the plaintiff to show the existence of a duty, a breach of that duty, and an injury resulting proximately from the breach.

Zieger v. Burchwell, Clermont App. No. CA2009-11-077, 2010-Ohio-2174, ¶13. Duty may be established by common law, legislative enactment, or the specific circumstances of a given case. *Chambers v. St. Mary's School*, 82 Ohio St.3d 563, 565, 1998-Ohio-184. It is undisputed from the record that Bainum was attempting to turn left onto Hopper Hill Road from the Smokey Bones parking lot at the time of the accident. The record also indicates that Liegel was driving northbound on Hopper Hill Road at the time of the collision.

{¶12} R.C. 4511.44 requires "[t]he operator of a vehicle * * * about to enter or cross a highway from any place other than another roadway [to] yield the right of way to all traffic approaching on the roadway to be entered or crossed." R.C. 4511.01 defines "right of way", as "[t]he right of a vehicle * * * to proceed uninterruptedly in a lawful manner in the direction in which it or the individual is moving in preference to another vehicle * * * approaching from a different direction into its or the individual's path." R.C. 4511.01(UU). Thus, these sections established the duty Bainum owed to Liegel when he attempted to turn onto Hopper Hill Road.

{¶13} R.C. 4511.44 and R.C. 4511.01 provide the vehicle on the highway with an absolute right of way in proceeding uninterruptedly, qualified only by the requirement that the vehicle is proceeding in a lawful manner. *Beers v. Wills,* 172 Ohio St. 569, 571. Additionally, the law presumes that the driver with the right of way is proceeding lawfully, meaning in compliance with all Ohio traffic laws. *State v. Neiser* (August 28, 1989), Clermont App. No. CA88-12-095, at 3-4; *In re* Neil, 160 Ohio App.3d 439, 2005-Ohio-1696, ¶10. Thus, a party is not required to prove lawful operation as an element of proving a violation of R.C. 4511.44(A). Rather, a driver who alleges that an opposing driver forfeited the right of way status, must present evidence rebutting the presumption by showing that the driver proceeded in an unlawful manner. *Neiser* at 3-4. If a driver loses his preferential right of way status, then the relative obligations of the two drivers are governed by common law. *Morris v.*

Bloomgren (1933), 127 Ohio St.147, paragraph three of the syllabus.

{¶14} It is undisputed that Bainum violated R.C. 4511.44 when he failed to yield to the right of way of Liegel when he attempted to turn onto Hopper Hill and collided with Liegel's vehicle. Bainum admitted in his answers to interrogatories that he "turned in front of the vehicle of Janet Liegel." Yet, he asserts Liegel was negligent and forfeited her right of way status by exceeding the posted speed limit. He argues that his affidavit and answers to interrogatories created a genuine issue of material fact as to Liegel's speed. Thus, in order to survive the motion for summary judgment, Bainum was required to present evidence that Liegel was speeding at the time of the accident.

{¶15} In deciding whether an evidentiary conflict exists so as to preclude summary judgment, a trial court must adhere to Civ.R. 56(C). *Turner v. Turner*, 67 Ohio St.3d 337, 341, 1993-Ohio-176. Pursuant to Civ.R. 56(C), the only evidence to be considered in ruling on a summary judgment motion is "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact." The affidavits in support of or in opposition of a motion for summary judgment must be made on personal knowledge, contain facts that would be admissible in evidence, and establish the affiant's competency. Civ.R. 56(E). Furthermore, the evidence necessary to create a genuine issue of material fact must be more than just bare, unsupported assertions. "[I]t is well-established that a 'party's unsupported and self-serving assertions, offered by way of affidavit, standing alone and without corroborating materials under Civ.R. 56, will not be sufficient to demonstrate material issues of fact' * * *." *Hillstreet Fund III, L.P. v. Bloom,* Butler App. No. CA2009-07-178, 2010-Ohio-2961, ¶10 citing *TJX Cos., Inc. v. Hall,* 183 Ohio App.3d 236, 2009-Ohio-3372, ¶30. To hold otherwise would "necessarily abrogate the utility of the summary judgment exercise" and allow Bainum, the nonmoving party, to avoid summary judgment "by simply submitting such a self-serving affidavit containing nothing

more than bare contradictions of the evidence offered by the moving party." *Bloom* at ¶10, quoting *Pavlik v. Cleveland,* Cuyahoga App. No. 92176, 2009-Ohio-3073, ¶21; *Bell v. Beightler,* Franklin App. No. 02AP-569, 2003-Ohio-88, ¶33.

{¶16} In support of the motion for summary judgment, Liegel testified, by way of affidavit, she was traveling lawfully, at a rate of 30 m.p.h. when "Defendant failed to yield while making his turn from the parking lot/drive, and Defendant's vehicle collided with my vehicle. This collision caused damage to the front driver's side of my vehicle." Further, Officer Grooms of the Union Township Police Department who investigated the accident stated that the speed limit at the location of the accident was 45 m.p.h., and he estimated Liegel was traveling 30 m.p.h. at the time of the collision which is consistent with Liegel's affidavit testimony. Officer Grooms concluded, based on his investigation, that the accident occurred when Bainum "failed to yield while making a left-hand turn from a private driveway and struck Ms. Liegel's vehicle." Officer Grooms explained that he prepared a Traffic Crash Report with respect to this accident using the information he had obtained through interviews of witnesses and his investigation at the scene. Officer Grooms further stated that it is a regular practice of the Department to prepare such a report.

{¶17} In opposition, Bainum argued that his affidavit and answers to interrogatories created a question of fact as to (1) whether Liegel was traveling lawfully at the time of the accident and (2) whether a tree, bush, and telephone pole contributed to the accident. Bainum presented no evidence to dispute the damages to Liegel's vehicle.

{¶18} Bainum stated he "believed" Liegel was "traveling at a rate of speed in excess of the posted speed limit prior to the accident" and that she was "traveling too fast at the time of this accident." He further stated that he "believe[d] that if the other vehicle involved in this accident had not been traveling so fast at the time of this accident they could have avoided this incident." All of these statements are bare, unsupported assertions by Bainum and did

not create a genuine issue of material fact regarding Liegel's speed.

{¶19} Additionally, Bainum's opinion that Liegel was speeding at the time of the accident was inadmissible. A person of ordinary intelligence and experience without proof of further qualification, who observes a passing automobile, is presumably capable of expressing his opinion as to its speed. *State v. Auerbach* (1923), 108 Ohio St. 96, 101. Bainum stated that he was "uncertain" of Liegel's speed and that he could not see her until she was about 30 to 50 feet away because his view was obstructed by a tree, bush, and telephone pole. Because Bainum did not observe Liegel's vehicle pass by or as it approached the parking lot, but rather saw it just 30 to 50 feet prior to impact, he is not qualified to give his opinion has to Liegel's speed. Although we must give Bainum the benefit of all favorable inferences, it would be unreasonable to infer that Liegel was speeding based on Bainum's "belief" that she was doing so, given that he was unable to view Liegel's vehicle prior to impact. Thus, his assertion that she was speeding is speculative, not based on personal observation, and therefore inadmissible.

{¶20} Bainum also asserted that Liegel was speeding based on: (1) the fact that she applied her brakes, (2) the distance Liegel's vehicle slid, and (3) the amount of damage caused to each vehicle. Opinion testimony estimating speed based on the factors cited by Bainum are all beyond the reach of a lay person. This type of testimony falls into the category of expert testimony because it relates to matters beyond the knowledge or experience possessed by a lay person. See Evid.R. 702. Before a witness may testify to specialized matters, Evid.R. 702 requires the witness to show that he is "qualified by specialized knowledge, skill, experience, training, or education." Evid.R. 702(B). Bainum did not provide any qualifications or experience which demonstrated that he was capable of giving an opinion as to Liegel's speed based on these factors. Because Bainum did not provide any evidence as to his qualifications, his opinion regarding Liegel's speed based

upon the use of her brakes, length of slide, and damage to each vehicle was inadmissible. Again, these statements were bare, unsupported assertions by Bainum in attempt to defeat Liegel's motion for summary judgment. Therefore, all of Bainum's statements relating to Liegel's speed were inadmissible and could not be considered by the trial court in ruling on the summary judgment motion.

{¶21} As to the issue of Liegel's speed, reasonable minds could come to but one conclusion and that conclusion is adverse to Bainum. Thus, we find that the trial court correctly concluded that Liegel was proceeding in a lawful manner by complying with Ohio traffic laws and thereby retained the right of way. Consequently, Bainum breached his duty to yield to Liegel's right of way under R.C. 4511.44. Thus, summary judgment was appropriate on this issue.

{¶22} Furthermore, Bainum asserts that there was a question of fact as to whether a tree, bush, and telephone pole could have contributed to the accident. Bainum stated he was unable to see Liegel's vehicle approaching from the left because of a tree, bush and telephone pole which obstructed the view of any vehicle exiting the Smokey Bones parking lot. This testimony, however, supports rather than refutes the conclusion that Bainum was the sole proximate cause of the accident. Ohio law imposes a duty of reasonable care upon all motorists driving on the roadway. See *Morris v. Bloomgren* (1933), 127 Ohio St.147, 152. Such reasonable care includes the responsibility to observe the environment in which they drive, not only in front of their vehicle, but also to the sides, as the circumstances may warrant. See e.g., *Hubner v. Sigall* (1988), 47 Ohio App.3d 15, 17; *Shortridge v. Dept. of Public Safety* (1997), 90 Ohio Misc.2d 50, 54; *Scott v. Marshall* (1957), 90 Ohio App. 347, 365. Further, this court has found that: "An ordinary and reasonably prudent person would still be expected to exercise some degree of caution before making a blind entrance onto the highway." *State v. Gaskins,* Butler App. No. CA2005-01-016, 2005-Ohio-503, ¶8. Due to the

view obstruction caused by the bush, tree, and telephone pole, Bainum had a duty to use reasonable care before entering the highway. Instead of pulling directly and blindly out into traffic, Bainum had a duty to pull past those objects obstructing his vision and view the oncoming traffic. By Bainum's own admissions, he turned in front of Liegel's vehicle and onto Hopper Hill Road without paying attention to the traffic conditions. On such evidence, reasonable minds could only come to one conclusion, that Bainum was the sole proximate cause of accident. Bainum's failure to comply with this duty, in conjunction with the breach of his duty to yield to Liegel's right of way, establishes that Bainum's actions were the proximate cause of the accident. Accordingly, Liegel and State Farm were entitled to summary judgment.

{¶23} Finally, Bainum argues in his second assignment of error that the trial court failed to construe the evidence most strongly in his favor. We find Bainum failed to present sufficient evidentiary materials under Civ.R. 56(C) to support what he claimed to be disputed facts, including Liegel's speed and whether the tree, bush or telephone pole, in any way, contributed to the accident. As such, there was no evidence in which the trial court was required to construe in Bainum's favor. Accordingly, Bainum's two assignments of error are overruled.

{¶24} Judgment affirmed.

POWELL, P.J., and PIPER J., concur.