[Cite as *Hudson v. Hapner*, 2016-Ohio-1347.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
HIGHLAND COUNTY

KENNETH HUDSON,	:	
Plaintiff-Appellant,	:	Case No. 15CA2
vs.	:	
JON C. HAPNER, ADMINISTRATOR OF THE ESTATE	:	
		DECISION AND JUDGMENT ENTRY
RICHARD WILLIAMS, Defendant,	:	
and	:	
STATE FARM FIRE AND CASUALTY COMPANY,	:	
Intervenor-Appellee.	:	

APPEARANCES:

Conrad A. Curren, Greenfield, Ohio, for appellant.

John F. McLaughlin, RENDIGS, FRY, KIELY & DENNIS, LLP, Cincinnati, Ohio, for appellee.

CIVIL CASE FROM COMMON PLEAS COURT
DATE JOURNALIZED: 3-14-16
ABELE, J.

{¶ 1} This is an appeal from a Highland County Common Pleas Court summary judgment in favor of State Farm Fire and Casualty Company, intervening-defendant below and appellee herein.

{¶ 2} Kenneth Hudson, plaintiff below and appellant herein, raises the following assignment of error:

"THE TRIAL COURT ERRED TO THE DETRIMENT OF THE APPELLANT BY GRANTING PLAINTIFF/APPELLEE'S MOTION FOR SUMMARY JUDGMENT WHEN GENUINE ISSUES OF MATERIAL FACT EXISTED."

{¶ 3} On February 1, 2013, appellant filed a complaint against Richard Williams for injuries that appellant sustained after Williams shot him in the leg. Appellant alleged that Williams "maliciously assaulted" him. Williams later died. Jon C. Hapner, as administrator of Williams' estate, was substituted as the defendant. Hapner answered the complaint and asserted that "Williams was severely handicapped, mentally unstable, and any actions he took were in self defense." On March 5, 2014, appellant amended his complaint to allege that Williams negligently injured appellant.

{¶ 4} Appellee, Williams' insurer, intervened in the action and sought a declaration that it does not have a duty to defend or indemnify Williams' estate against any claim arising out of appellant's shooting. Appellee asserted that its policy excluded coverage for appellant's bodily injury because his injury was "either expected or intended by [Williams]" or resulted from Williams' "willful and malicious act."

{¶ 5} Subsequently, appellee requested a summary judgment and alleged that its policy did not provide coverage for appellant's injuries because Williams intentionally shot Williams, Williams "expected and intended" to injure appellant, and appellant's injuries resulted from Williams' "willful and malicious acts." Appellee asserted that its policy excludes coverage for bodily injury that "is either expected or intended by the insured" or that "is the result of willful and malicious acts of the insured." Appellee argued that because reasonable minds could only

conclude that Williams intended to shoot and injure appellant, or that he did so willfully or maliciously, its policy did not provide coverage for appellant's injuries. To support its motion, appellee attached a copy of its insurance policy and partial deposition transcripts of appellant, a Hillsboro police officer and a police dispatcher.

{¶ 6} Appellant's memorandum contra asserts that genuine issues of material fact remained regarding whether Williams possessed the mental capacity to intentionally shoot him. Appellant contended that police dispatch records that document the calls that Williams made to the police department raised doubts about his mental capacity. Appellant alleged that five months after Williams shot appellant, Williams called the police department and reported that he was going to kill appellant because appellant had been on his property "sneaking around and messing with his TV because it is not working." The police dispatcher, Pamela Reid, testified that Williams called frequently. She asked Williams if he was "on his medication," which, according to appellant, indicated that she knew Williams had mental problems. Appellant further alleged that Williams' defense attorney in the criminal matter requested a psychiatric examination, which further raised doubts about Williams' mental capacity to intentionally shoot appellant. Appellant also argued that appellee "'cherry-picked' excerpts from the depositions to make its claim while leaving out more illuminating information." Appellant did not, however, specifically refer to the particular deposition testimony that he claims would have been "more illuminating."

{¶ 7} On December 18, 2014, appellee filed a reply memorandum and asserted that appellant failed to show the existence of a genuine issue of material fact regarding Williams' mental capacity to intentionally shoot appellant. Appellee argued that appellant must present expert testimony to demonstrate that Williams lacked the mental capacity to form intent, and that

appellant's failure to do so was fatal to his assertion that Williams lacked the mental capacity to form an intent to shoot appellant. Appellee further contended that the evidence supports an inference that Williams intended to shoot appellant and that "proof of [appellant']s subjective intent is unnecessary." Appellee additionally asserted that appellant failed to address appellee's argument that the malicious and willful exception precludes coverage.

{¶ 8} Although appellee attached to its summary judgment motion only certain excerpts of the depositions taken in the case, the entire deposition transcripts were filed with the court. Hillsboro Police Dispatcher Pamela Reid testified that Williams frequently called the police department to register complaints about appellant. She stated that on February 27, 2013, at approximately 4:25 a.m., she received a call from Williams, and he stated, "I am going to shoot [appellant]." Williams reported that appellant "had been stealing off of him for the last 20 years and the Hillsboro Police Department has never done anything." Reid explained that before she received this phone call, she knew that Williams shot appellant. Reid asked Williams if he "meant to [shoot appellant], and he told [her] that he meant to." The dispatch record included with her deposition indicates that she also asked him "if he is on his medication, [and] he advised yes."

{¶ 9} Hillsboro Police Officer Foister Hampton testified that on September 4, 2012, appellant called to report that Williams threatened to kill him. Officer Hampton went to speak with appellant, and appellant "indicated he felt Mr. Williams was suffering from mental illness, had mental health issues." Appellant informed Officer Hampton that "there was some kind of bad history between [appellant and Williams], and Mr. Williams did not like [appellant]." Officer Hampton stated that when he spoke with Williams, he believed he had "some [physical] medical

impairment." Officer Hampton explained that Williams had difficulty moving his arm, and the officer wondered if Williams previously had a stroke. Officer Hampton stated that Williams seemed to stutter, but the officer believed Williams' thoughts were organized and that Williams appeared coherent.

{¶ 10} Officer Hampton testified that on September 12, 2012, he responded to reports of shots fired in the area where appellant lived. When the officer arrived, he found appellant hiding behind a tree with a shotgun in his hand. Appellant told the officer that Williams shot him. Officer Hampton spoke with Williams and Williams claimed that he shot the gun in the air. Williams later admitted, however, that he shot appellant in the leg. Officer Hampton believed that Williams had the mental ability to attempt to deceive him by initially claiming that Williams shot the gun in the air.

{¶ 11} Appellant testified that before Williams shot him, Williams threatened to shoot him almost daily. Appellant stated that Williams rode his electric scooter by appellant's house nearly every day, cussed at him, and accused him of stealing. On some occasions, Williams stated that he would "blow [appellant's] head off," and other times, Williams stated, "I'm going to cripple you up."

{¶ 12} Appellant stated that on the day of the shooting, Williams threatened "to put [appellant] in the grave." When asked if appellant thought Williams was "acting crazy" on the day of the shooting, appellant stated, "No. He was just threatening me and threatening me." Appellant described Williams' behavior on the day of the shooting as "irrational." Appellant also relayed his belief that at the time of the shooting, Williams was "mentally unbalanced, something wrong with his mind." Appellant's counsel asked appellant whether he thought Williams "was

nuts" at the time of the shooting, and appellant stated, "[y]es." Appellant explained: "Something was wrong with [Williams], yes." Appellant later stated: "People, they would tell me [Williams] was losing his mind or something, but I didn't know." At another point during his deposition, appellant was asked if he suspected that Williams suffered from a mental illness. Appellant replied, "I don't know."

{¶ 13} On December 31, 2014, the trial court awarded appellee summary judgment. The court determined that appellee's policy excluded coverage for bodily injury that resulted from its insured's intentional, willful, or malicious act. The court found that appellant failed to present any competent evidence to dispute that Williams shot appellant, that Williams admitted that he intended to shoot appellant, and that Williams threatened to shoot appellant before the shooting.

{¶ 14} In reaching its decision, the court also rejected appellant's argument that genuine issues of material fact remained regarding Williams' mental capacity to form intent, and consequently, whether appellant's injuries are excluded under the intentional/expected or willful/malicious exclusions.[1] The court noted that appellant failed to submit any affidavits or

[1] In Nationwide Ins. Co. v. Estate of Kollstedt, 71 Ohio St.3d 624, 627, 1995-Ohio-245, 646 N.E.2d 816, 819 (1995), the court held:

> "[A] provision in a liability insurance policy which excludes coverage to an insured where the insured expected or intended to cause bodily injury or property damage does not apply under circumstances where the insured was mentally incapable of committing an intentional act. When disputed, the determination whether an insured lacked the mental capacity to commit an intentional act is a matter to be determined, in the first instance, by a trial court, and such determination is to be made by the trial court on the basis of the evidence. Such a determination will not be disturbed, absent an abuse of discretion."

The court further explained that "within the context of an intentional-injury-exclusion clause in an insurance contract, insanity should be defined 'an act of an individual cannot be treated as "intentional" if the insured was suffering from a derangement of his intellect which deprived him of the capacity to govern his conduct in accordance with reason.'" Id. at 626, quoting Nationwide Mut. Fire Ins. Co. v. Turner, 29 Ohio App.3d 73, 29 OBR 83, 503 N.E.2d 212 (1986), abrogated on other grounds Westfield Ins. Co. v. Hunter, 128 Ohio St.3d 540, 2011-Ohio-1818, 948 N.E.2d 931 (2011).

other materials in opposition to appellee's summary judgment motion to support his argument. The court explained that appellant "has not proffered any admissible evidence as to the decedent's insanity for purposes of this case. As noted by Defendant, Ohio law, [sic] expert testimony regarding a party's insanity must be presented in order to be submitted to a jury."[2] The court also

[2] Appellee cited State v. Walter, 8th Dist. Cuyahoga No. 56562 (Feb. 1, 1990), a criminal case, to support its allegation that expert testimony is required to prove mental incapacity. Walter held that expert testimony

> "is required to assist the jury in determining whether in fact at the time of the offense the defendant was suffering from a mental disease or other defect of his mind and, most importantly, the effect of the disease or defect on the defendant's ability to know the wrongfulness of an act or to refrain from doing a particular act. Simply because one may be suffering from a mental disease, brain damage or other defect does not mean one is legally insane unless it affects one's behavior to the extent required to establish legal insanity. Only an expert would be so well versed in the various mental diseases or other defects to analyze the possible degrees of affect they could have on any individual's behavior at any given time. Experts can administer tests, interpret test results, and interview and evaluate a defendant to determine the cause of a defendant's behavior."

Id. (citations omitted).

We note, however, that other courts, including this court, have indicated that a lay witness may testify about an individual's emotional or mental state, including insanity or mental incapacity. State v. Filaggi, 86 Ohio St.3d 230, 244, 714 N.E.2d 867 (1999) (recognizing that lay witness testimony combined with expert testimony concerning defendant's state of mind helped establish that defendant knew the wrongfulness of his conduct); Paugh v. Hanks, 6 Ohio St.3d 72, 80, 451 N.E.2d 759 (1983) (stating that in a case alleging emotional distress "expert medical testimony can assist [the factfinder] in determining whether the emotional injury is indeed, serious," and "lay witnesses who were acquainted with the plaintiff, may testify as to any marked changes in the emotional or habitual makeup that they discern in the plaintiff after the accident has occurred"); State v. Thomas, 70 Ohio St.2d 79, 80, 434 N.E.2d 1356, 1357-58 (1982) (noting lay witnesses testified regarding defendant's thought processes near time of criminal offense and stating that "insanity is an issue for the jury to decide" and "the jury may give more weight to lay witnesses than to experts if it so chooses"); Weis v. Weis, 147 Ohio St. 416 72 N.E.2d 246 (1947) ("A nonexpert witness who testifies to facts sufficient to show that he has had the opportunity to observe the mental state of a person may further testify as to whether such person was, in the opinion of the witness, of sound or unsound mind, and whether such person had the capacity to form the purpose and intent to dispose of his property by will); Baltimore & O.R. Co. v. Schultz, 43 Ohio St. 270, 281, 1 N.E. 324, 331 (1885) (explaining that "the opinions of non-experts, who state, so far as is practicable, the facts on which their opinions are grounded, will be received on questions * * * of the mental state or condition of another; of insanity * * * *"); State v. Sibert, 98 Ohio App.3d 412, 426, 648 N.E.2d 861, 869 (4th Dist.1994) ("When based on personal observations, a lay witness may testify about another's emotional state, physical condition or sanity."); accord State Farm Mut. Auto. Ins. Co. v. Gourley, 10th Dist. Franklin 12AP-200, 2012-Ohio-4909, ¶36 ("Consistent with Evid.R. 701, a lay witness may testify about another's emotional state or physical condition if the testimony is based upon personal observations and first-hand perception."); Stockdale v. Baba, 153 Ohio App.3d 712, 2003-Ohio-4366, 795 N.E.2d 727, ¶83 (10th Dist.) (recognizing that a lay witness may express opinions about an individual's insanity); Hunt v. Crossroads Psychiatric & Psychological Ctr., 8th Dist. Cuyahoga No. 79120, 2001 WL 1558574, *4 (Dec. 6, 2001) (permitting lay witness testimony regarding decedent's mental state); Turner, supra, 29 Ohio App.3d at 75-76 (determining that wife's testimony concerning husband-insured's mental state created a genuine issue of material fact regarding insured's

observed that appellant claimed that other parts of the deposition that appellee did not cite would have been "more illuminating." The court stated, however, that "since there were no additional portions of the deposition cited, the Court is unable to consider these as evidence of any factual dispute."

{¶ 15} The trial court also observed that appellant referred to Williams' defense attorney's request for a psychiatric exam in contemplation of an insanity defense at Williams' criminal trial (Williams apparently died before the exam could be completed). The trial court judge noted, however, that he also presided over Williams' criminal proceedings and found, after two evaluations, that Williams was competent to stand trial under the test for criminal defendants.[3]

{¶ 16} Thus, the trial court determined that appellee's policy did not provide coverage for appellant's injuries. The court concluded that the shooting did not constitute an "accident" and, therefore, was not an "occurrence" within the meaning of appellee's policy. The court additionally found that the "expected and intended" injury exclusion applied because appellee

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mental state). As the court explained in State v. Warmus, 197 Ohio App.3d 383, 2011-Ohio-5827, 967 N.E.2d 1223, ¶11 (8th Dist.):

> "Neither Evid.R. 701 nor 704 limits the subject matter of lay-opinion testimony, so 'there is no theoretical prohibition against allowing lay witnesses to give their opinions as to the mental states of others.' United States v. Rea (C.A.2, 1992), 958 F.2d 1206, 1214–1215 (construing analogous federal rules). For example, it has been stated that '[l]ay opinion of a witness as to a person's sanity is admissible if the witness is sufficiently acquainted with the person involved and has observed his conduct' and has personal knowledge 'regarding the person's unusual, abnormal or bizarre conduct.' United States v. LeRoy (C.A.10, 1991), 944 F.2d 787, 789. See also State v. Nicholas (July 30, 1986), 1st Dist. No. C–850713, 1986 WL 8407 (when an insanity defense was raised, lay opinion of a police officer concerning the defendant's mental state was appropriate on ability to perceive and respond to the display of authority of uniformed officers at the scene)."

[3] We observe that "[i]ncompetency must not be equated with mere mental or emotional instability or even with outright insanity. A defendant may be emotionally disturbed or even psychotic and still be capable of understanding the charges against him and of assisting his counsel." State v. Bock, 28 Ohio St.3d 108, 110, 502 N.E.2d 1016 (1986).

presented uncontroverted proof that Williams intended to injure appellant by shooting him. This appeal followed.

{¶ 17} In his sole assignment of error, appellant argues that the trial court improperly entered summary judgment in appellee's favor. In particular, appellant contends that genuine issues of material fact remain regarding whether Williams intentionally shot appellant, or whether Williams lacked the mental capacity to intentionally shoot him.

{¶ 18} Generally, appellate courts conduct a de novo review of trial court summary judgment decisions. E.g., Snyder v. Ohio Dept. of Nat. Resources, 140 Ohio St.3d 322, 2014-Ohio-3942, 18 N.E.3d 416, ¶2; Troyer v. Janis, 132 Ohio St.3d 229, 2012-Ohio-2406, 971 N.E.2d 862, ¶6; Grafton v. Ohio Edison Co., 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Accordingly, an appellate court must independently review the record to determine if summary judgment is appropriate and need not defer to the trial court's decision. E.g., Brown v. Scioto Bd. of Commrs., 87 Ohio App.3d 704, 711, 622 N.E.2d 1153 (1993); Morehead v. Conley, 75 Ohio App.3d 409, 411–12, 599 N.E.2d 786 (1991). To determine whether a trial court properly granted a summary judgment motion, an appellate court must review the Civ.R. 56 summary judgment standard, as well as the applicable law. Snyder at ¶2. Civ.R. 56(C) provides in relevant part:

> * * * Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor. * * * *

Thus, pursuant to Civ.R. 56, a trial court may not grant summary judgment unless the evidence demonstrates that: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) after viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion, and that conclusion is adverse to the nonmoving party. E.g., Snyder at ¶20; Transtar Elec., Inc. v. A.E.M. Elec. Servs. Corp., 140 Ohio St.3d 193, 2014-Ohio-3095, 16 N.E.3d 645, ¶8; Smith v. McBride, 130 Ohio St.3d 51, 2011-Ohio-4674, 955 N.E.2d 954, ¶12; New Destiny Treatment Ctr., Inc. v. Wheeler, 129 Ohio St.3d 39, 2011-Ohio-2266, 950 N.E.2d 157, ¶24; Vahila v. Hall, 77 Ohio St.3d 421, 429–30, 674 N.E.2d 1164 (1997).

{¶ 19} The purpose of Civ.R. 56 "is to enable movement beyond allegations in pleadings and to analyze the evidence so as to ascertain whether an actual need for a trial exists. Because it is a procedural device to terminate litigation, summary judgment must be awarded with caution." Ormet Primary Aluminum Corp. v. Employers Ins. of Wausau, 88 Ohio St.3d 292, 300, 725 N.E.2d 646 (2000) (citations omitted). Thus, a court that is reviewing a summary judgment motion must construe all reasonable inferences that can be drawn from the evidentiary materials in a light most favorable to the nonmoving party. Moore v. E.I. DuPontde Nemours Co., 4th Dist. Pickaway No. 15CA12, 2015-Ohio-5331, ¶20, citing Hannah v. Dayton Power & Light Co., 82 Ohio St.3d 482, 485, 696 N.E.2d 1044 (1998), and Turner v. Turner, 67 Ohio St.3d 337, 341, 617 N.E.2d 1123 (1993). Moreover, a court must not "consider either 'the quantum' or the 'superior credibility' of evidence." McGee v. Goodyear Atomic Corp., 103 Ohio App.3d 236, 242, 659 N.E.2d 317 (1995). "The purpose of summary judgment is not to try issues of fact, but rather to

determine whether triable issues of fact exist. * * * Thus, a court should not pass upon the credibility of witnesses or weigh the relative value of their testimony in rendering summary judgment." McGee, 103 Ohio App.3d at 242–43 (citation omitted.); see also Koeth v. Timesavers, Inc. (May 26, 2000), 11th Dist. Geauga App. No. 99–G–2211, unreported ("It is not the province of the trial court in a summary judgment exercise to either weigh the evidence before it, or to accept one party's interpretations of that evidence in toto.").

{¶ 20} Under Civ.R. 56, the moving party bears the initial burden to inform the trial court of the basis for the motion and to identify those portions of the record that demonstrate the absence of a material fact. Vahila, supra; Dresher v. Burt, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). The moving party cannot discharge its initial burden with a conclusory assertion that the nonmoving party has no evidence to prove its case. Kulch v. Structural Fibers, Inc., 78 Ohio St.3d 134, 147, 677 N.E.2d 308 (1997); Dresher, supra. Rather, the moving party must specifically refer to the "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any," which affirmatively demonstrate that the nonmoving party has no evidence to support the nomoving party's claims. Civ.R. 56(C); Dresher, supra.

{¶ 21} "[U]nless a movant meets its initial burden of establishing that the nonmovant has either a complete lack of evidence or has an insufficient showing of evidence to establish the existence of an essential element of its case upon which the nonmovant will have the burden of proof at trial, a trial court shall not grant a summary judgment." Pennsylvania Lumbermens Ins. Corp. v. Landmark Elec., Inc., 110 Ohio App.3d 732, 742, 675 N.E.2d 65 (2nd Dist.1996). Once

the moving party satisfies its burden, the nomoving party bears a corresponding duty to set forth specific facts to show that a genuine issue exists. Civ.R. 56(E); Dresher, supra.

{¶ 22} The nonmoving party's reciprocal duty does not, however, relieve a trial court of its mandatory duty to review "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, [that are] timely filed in the action." Civ.R. 56(C); MacCabee v. Mollica, 4th Dist. Athens No. 09CA32, 2010-Ohio-4310, ¶14, citing Morris v. Ohio Cas. Ins. Co., 35 Ohio St.3d 45, 47, 517 N.E.2d 904 (1988) (stating that "a trial court may not grant a summary judgment motion on the sole basis that the nonmoving party failed to respond to the motion"). "Civ.R. 56(C) places a mandatory duty on a trial court to thoroughly examine all appropriate materials filed by the parties before ruling on a motion for summary judgment. The failure of a trial court to comply with this requirement constitutes reversible error." Murphy v. Reynoldsburg, 65 Ohio St.3d 356, 604 N.E.2d 138 (1992), paragraph one of the syllabus; accord MacCabee at ¶14. "The wording of Civ.R. 56(C) makes it clear that a trial court must conscientiously examine all the evidence before it when ruling on a summary judgment motion." Murphy, 65 Ohio St.3d at 359. Thus, when a deposition is properly filed with the trial court, the court must actually read it. Kelly v. Coca-Cola Bottling Co., 1st Dist. Hamilton No. C-030770, 2004-Ohio-3500, ¶23 ("Once the deposition was filed within the period of leave granted following the hearing on the motion, the trial court, simply put, had to read it."). Accordingly, when "a court has failed to consider a deposition properly before it in rendering summary judgment it commits error which is, per se, prejudicial and renders the judgment erroneous as a matter of law." Kramer v. Brookwood Retirement Community, 1st Dist. No. C–920182, 1993 WL 293413 (Aug. 4, 1993); accord Kelly v. Coca-Cola Bottling Co., 1st Dist.

Hamilton No. C-030770, 2004-Ohio-3500, ¶23 (determining that trial court's failure "to consider all appropriate materials under Civ.R. 56(C) constituted incurable reversible error;" and rejecting argument that trial court did not have a duty to read deposition when nonmoving party failed to refer to it in opposition memorandum and when moving party referred to it in its memorandum in support of summary judgment); see Wicker v. Burger King, 3rd Dist. Allen No. 1-97-10, 1997 WL 232243, *1 (May 2, 1997), citing Murphy v. Reynoldsburg, 65 Ohio St.3d 356, 604 N.E.2d 138, syllabus (1992) ("A court is not limited to review of the evidence urged by the moving party[;] we also must examine all evidence properly before the court, including the affidavits, pleadings, depositions, and answers to interrogatories to determine the existence or not of disputed material facts."). A-M.R. v. Columbus City School Dist., 10th Dist. No. 14AP-1066, 2015-Ohio-3781, 41 N.E.3d 489, ¶15 (reversing trial court's summary judgment when trial court did not consider a deposition filed in the case).

{¶ 23} In the case sub judice, it appears that the parties provided various excerpts of deposition testimony in support of their summary judgment arguments. It does not appear, however, that the trial court actually considered all of the depositions filed in the case. The court noted appellant's argument that certain parts of the depositions may have been "more illuminating" regarding Williams' mental capacity, but concluded that appellant's failure to cite to the deposition transcripts meant that it could not consider the "more illuminating" parts as evidence of any factual dispute. The court stated: "[S]ince there were no additional portions of the deposition cited, the Court is unable to consider these as evidence of any factual dispute." Moreover, the court stated that it reviewed "the motion and the memorandum with supporting documents filed by [appellee], [appellant]'s memorandum in opposition to the motion, and [appellee]'s reply memorandum."

Notably, the court did not state that it reviewed the depositions filed in the case. Thus, we believe that Murphy applies in this situation and we must reverse and remand the judgment so that the trial court may consider all of the appropriate Civ.R. 56(C) evidence filed in the case.[4] Moreover, the trial court may also wish to revisit the issue of the absence of expert testimony in this matter (see discussion and citations in footnote 2, supra).

{¶ 24} Accordingly, based upon the foregoing reasons, we hereby sustain appellant's sole assignment of error, reverse the trial court's judgment and remand the matter for proceedings consistent with this opinion.

JUDGMENT REVERSED AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

[4] We wish to emphasize at this juncture of the proceedings that we express no opinion regarding the ultimate merits of appellant's claim.

JUDGMENT ENTRY

It is ordered that the judgment be reversed and remanded for further proceedings consistent with this opinion. Appellant recover of appellee the 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 Highland County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Harsha, J. & Hoover, J.: Concur in Judgment & Opinion

For the Court

BY:_____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.