[Cite as *Robinson v. Tilton*, 2010-Ohio-5090.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
CARL ROBINSON	:	Hon. W. Scott Gwin, P.J.
	:	Hon. Sheila G. Farmer, J.
Plaintiff-Appellant	:	Hon. Patricia A. Delaney, J.
	:	
-vs-	:	
	:	Case No. CT2009-0046
JEFF TILTON	:	
	:	
Defendant-Appellee	:	O P I N I ON

CHARACTER OF PROCEEDING:	Civil appeal from the Muskingum County Court of Common Pleas, Case No. CH2008-0833
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	October 14, 2010

APPEARANCES:

For Plaintiff-Appellant	For Defendant-Appellee
CARL ROBINSON PRO SE 817 Maple Avenue Zanesville, OH 43701	VINCENT C. RUSSO MAGAZINER & McGLADE 44 South 6th St., Box 970 Zanesville, OH 43702-0970

Gwin, P.J.

{¶1} Plaintiff Carl Robinson appeals a summary judgment of the Court of Common Pleas of Muskingum County, Ohio, entered in favor of defendant-appellee Jeff Tilton. Appellant assigns two errors to the trial court:

{¶2} "I. FROM THE BEGINNING OF THIS CASE THIS WAS TO BE A JURY TRIAL. PLEASE SEE ENCLOSED DOCUMENT K-11. AS THIS COURT IS PERFECTLY AWARE THE SEVENTH AMENDMENT OF THE BILL OF RIGHTS HOLDS THAT IN CIVIL MATTER, THE RIGHT TO A JURY TRIAL SHALL BE PRESERVED. THEREFORE A SUMMARY JUDGEMENT [SIC] SHOULD NOT HAVE BEEN GRANTED TO THE APPELLEE.

{¶3} "II. THE JUDGE IN THIS CASE WAS COMPELLED, BY THE COUNSEL FOR THE APPELLEE TO GRANT A SUMMARY JUDGEMENT [SIC] ON BEHALF OF HIS CLIENT. AFTER A BRIEF PRETRIAL HELD ON SEPTEMBER 28, 2009 THE SUMMARY JUDGEMENT [SIC] WAS GRANTED. ALTHOUGH THE JURY TRIAL HAD ALREADY BEEN SCHEDULED FOR OCTOBER 8TH AND 9TH 2009."

{¶4} The record indicates appellant filed his complaint in October, 2008, alleging appellee struck him in the chest, resulting in intentional and/or negligent infliction of emotional distress. On October 22, 2008, appellant filed a jury demand.

{¶5} On June 11, 2009, the trial court entered a pre-trial order setting the matter for a one-day bench trial, but later, reset the matter for a jury trial. In September 2009, appellee filed a motion for summary judgment, which the trial court granted in favor of appellee.

I.

{¶6} In his first assignment of error, appellant argues the trial court violated his constitutional right to trial by jury by deciding the matter on summary judgment. We do not agree. In *State Farm Mutual Auto Insurance Co. v. Loken,* Fairfield App. No. 04CA40, 2004-Ohio-5074, this court found it has long been the law that a summary judgment does not infringe upon a party's right to a jury trial. *Loken* at paragraph 27, citing *Fidelity & Deposit Company v. United States* (1902),187 U.S. 315, 23 S. Ct. 120, 47 L. Ed. 194. See also *Tschantz v. Ferguson* (1994), 97 Ohio App. 3d 693, 713, 647 N.E. 2d 507.

{¶7} The first assignment of error is overruled.

II.

{¶8} In his second assignment of error, appellant argues the trial court erred as a matter of law in granting summary judgment.

{¶9} Civ. R. 56 states in part:

{¶10} 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. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

{¶11} A trial court should not enter a summary judgment if it appears a material fact is genuinely disputed, nor if, construing the allegations most favorably towards the non-moving party, reasonable minds could draw different conclusions from the undisputed facts, *Houndshell v. American States Insurance Company* (1981), 67 Ohio St. 2d 427. The court may not resolve ambiguities in the evidence presented, *Inland Refuse Transfer Company v. Browning-Ferris Industries of Ohio, Inc.* (1984), 15 Ohio St. 3d 321. A fact is material if it affects the outcome of the case under the applicable substantive law, *Russell v. Interim Personnel, Inc.* (1999), 135 Ohio App. 3d 301.

{¶12} When reviewing a trial court's decision to grant summary judgment, an appellate court applies the same standard used by the trial court, *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St. 3d 35. This means we review the matter de novo, *Doe v*. *Shaffer,* 90 Ohio St.3d 388, 2000-Ohio-186.

{¶13} The party moving for summary judgment bears the initial burden of informing the trial court of the basis of the motion and identifying the portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the non-moving party's claim, *Drescher v. Burt* (1996), 75 Ohio St. 3d 280. Once the moving party meets its initial burden, the burden shifts to the non-moving party to set forth specific facts demonstrating a genuine issue of material fact does exist, Id. The non-moving party may not rest upon the allegations and denials in the pleadings, but

instead must submit some evidentiary material showing a genuine dispute over material facts, *Henkle v. Henkle* (1991), 75 Ohio App. 3d 732.

{¶14} Civ. R. 53 (E) requires a party opposing the motion for summary judgment to respond by affidavit or other evidentiary material to demonstrate the specific facts showing there is a genuine issue for trial. Appellant did not provide the court with any evidentiary documents as set out in the Rule to demonstrate genuine issues of material fact for trial. Accordingly, we find the trial court did not err in entering summary judgment on behalf of appellee.

{¶15} The second assignment of error is overruled.

{¶16} For the foregoing reasons, the judgment of the Court of Common Pleas of Muskingum County, Ohio, is affirmed.

By Gwin, P.J.,

Farmer, J., and

Delaney, J., concur

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HON. W. SCOTT GWIN

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HON. SHEILA G. FARMER

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HON. PATRICIA A. DELANEY

WSG:clw 0922

[Cite as *Robinson v. Tilton*, 2010-Ohio-5090.]

IN THE COURT OF APPEALS FOR MUSKINGUM COUNTY, OHIO

FIFTH APPELLATE DISTRICT

CAROL ROBINSON	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
JEFF TILTON	:	
Defendant-Appellee	:	CASE NO. CT2009-0046

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Muskingum County, Ohio, is affirmed. Costs to appellant.

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HON. W. SCOTT GWIN

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HON. SHEILA G. FARMER

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HON. PATRICIA A. DELANEY