

COURT OF APPEALS
KNOX COUNTY, OHIO
FIFTH APPELLATE DISTRICT

RODERICK WILCOX

: JUDGES:

Plaintiff-Appellant

- : Hon. W. Scott Gwin, P.J.
- : Hon. Sheila G. Farmer, J.
- : Hon. Patricia A. Delaney, J.

-VS-

: Case No. 15CA1

DAVID DEVORE, ET AL.

Defendants-Appellees

: OPINION

CHARACTER OF PROCEEDING:

Appeal from the Knox County Court of
Common Pleas, Case No. 13 PI-07-
0313

JUDGMENT:

REVERSED AND REMANDED

DATE OF JUDGMENT ENTRY:

August 25, 2015

APPEARANCES:

For Plaintiff-Appellant:

For Defendants-Appellees:

JOHN F. GEORGIN
7588 Central Parke Blvd. #327
Mason, OH 45040

JOSEPH A. BUTAUSKI
6265 Riverside Dr., Suite A
Dublin, OH 43017

Delaney, J.

{¶1} Plaintiff-Appellant Roderick Wilcox appeals the January 9, 2015 judgment entry of the Knox County Court of Common Pleas granting summary judgment in favor of Defendants-Appellees David Devore and Mid-State Waste.

FACTS AND PROCEDURAL HISTORY

{¶2} On July 19, 2013, Plaintiff-Appellant Wilcox filed a complaint in the Knox County Court of Common Pleas naming Defendants-Appellees David Devore and Mid-State Waste as defendants (“Devore”). Wilcox alleged he suffered personal injuries in a motor vehicle accident on October 6, 2011 due to the negligence of Devore. Wilcox also alleged Devore was within the scope and course of his employment with Mid-State Waste at the time of the accident.

{¶3} Devore filed a joint motion for summary judgment on October 31, 2014. Wilcox filed a response. On January 8, 2015, the trial court granted summary judgment without analysis in favor of Devore. The judgment entry was journalized on January 9, 2015. The following facts were adduced from the Civ.R. 56 evidence submitted in support of the motion for summary judgment and the response to the motion for summary judgment.

{¶4} On October 6, 2011, Wilcox was on his 1975 Honda CB 500T motorcycle traveling west on Sycamore Road. Sycamore Road is located in Knox County and is a two-lane, paved road divided by double-yellow centerlines. A driver travelling westbound on Sycamore Road will crest a hill and drive down a slight decline before reaching the intersection of Sycamore Road and Sharp Road. Sycamore Road intersects with Sharp Road in a somewhat “T” formation. Sharp Road travels north to

south. If traveling eastbound on Sycamore Road, a driver must turn left onto Sharp Road. Sharp Road is not paved but is covered with gravel. The gravel from Sharp Road covers the intersection of Sharp Road and Sycamore Road and is spread onto the westbound lane of Sycamore Road.

{¶5} While Wilcox was traveling on Sycamore Road, Devore was driving a garbage truck for his employer Mid-State Waste. Devore was collecting trash and was working alone in the truck. Devore was traveling east on Sycamore Road.

{¶6} Devore testified in his deposition that as he approached Sharp Road, he stopped to allow a truck on Sharp Road to make a right turn onto Sycamore Road. The truck was pulling a large trailer. While he was stopped at the intersection, Devore stated he checked the top of the hill on Sycamore Road to see if any other vehicles were driving west. After allowing the truck to complete its right turn, Devore remained stopped to check the top of Sycamore Road for oncoming traffic. Devore did not see any traffic travelling west so he proceeded to turn left onto Sharp Road to head north. Devore testified he was approximately seven to eight feet onto Sharp Road when he noticed Wilcox cresting the hill on Sycamore Road. Devore thought Wilcox was traveling at an excessive rate of speed. Devore saw that as Wilcox came over the hill, he began wiping out on his motorcycle. Devore got his truck off Sycamore Road and onto Sharp Road. He stopped his truck because he felt Wilcox was in distress. Devore testified he had completed his left turn onto Sharp Road and his truck was completely stopped on Sharp Road when the right rear of his truck was struck by Wilcox's motorcycle. Devore did not see or hear Wilcox hit the truck.

{¶7} Wilcox testified he crested the hill of Sycamore Road at a speed of 50 to 51 miles per hour. He observed the garbage truck entirely in the eastbound lane of Sycamore Road. The truck appeared to Wilcox to be stopped or moving very slowly. As Wilcox approached the intersection of Sharp Road and Sycamore Road, Wilcox observed Devore turn the truck into his westbound lane. Wilcox, an experienced motorcyclist, applied the front and rear brakes of the motorcycle to avoid striking the truck. He locked the brakes of the motorcycle and skid in a straight line on the gravel from Sycamore Road to Sharp Road. Wilcox stated he began losing steering of the motorcycle when it hit the gravel but was able to keep it upright. Wilcox skidded into the rear of the garbage truck and was thrown from the motorcycle upon impact. He was wearing a helmet, but he suffered a broken right arm and a laceration on his left leg. Wilcox testified that at the moment of impact, the entirety of the truck was on Sharp Road. He stated he did not “lay down” the motorcycle to avoid going under the truck.

{¶8} The Ohio State Highway Patrol responded to the scene of the accident. It conducted a patrol crash report. Wilcox was cited for a failure to control in violation of R.C. 4511.202. Devore was not cited. A lay witness, who did not see the accident, provided a statement to Patrol that he believed Wilcox was speeding a short period before the accident on Sycamore Road. Wilcox denied speeding.

{¶9} Wilcox provided the expert opinion of Frederick W. Lickert, a traffic crash reconstructionist, to support his response to Devore’s motion for summary judgment. It was the expert’s opinion that based on the physical evidence of the crash scene, Devore failed to yield the right of way prior to making his left turn onto Sharp Road.

{¶10} Based on the motion for summary judgment and the Civ.R. 56 evidence, the trial court found there was no genuine issue of material fact that Devore was not negligent.

{¶11} It is from this judgment Wilcox now appeals.

ASSIGNMENT OF ERROR

{¶12} Wilcox raises one Assignment of Error:

{¶13} "THE TRIAL COURT [IMPROPERLY] GRANTED SUMMARY JUDGMENT PURSUANT TO CIV. RULE 56."

ANALYSIS

Standard of Review

{¶14} Wilcox argues in his sole Assignment of Error that the trial court erred in granting summary judgment in favor of Devore. We refer to Civ.R. 56(C) in reviewing a motion for summary judgment which provides, in pertinent part:

Summary judgment shall be rendered forthwith if the pleading, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case 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.* * * A summary judgment shall not be rendered unless it appears from such 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, such party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

{¶15} The moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record before the trial court, which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim. *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 662 N.E.2d 264 (1996). The nonmoving party then has a reciprocal burden of specificity and cannot rest on the allegations or denials in the pleadings, but must set forth “specific facts” by the means listed in Civ.R. 56(C) showing that a “triable issue of fact” exists. *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 115, 526 N.E.2d 798, 801 (1988).

{¶16} Pursuant to the above rule, a trial court may not enter summary judgment if it appears a material fact is genuinely disputed. *Vahila v. Hall*, 77 Ohio St.3d 421, 429, 674 N.E.2d 1164 (1997), citing *Dresher v. Burt*, 75 Ohio St.3d 280, 662 N.E.2d 264 (1996).

Genuine Issues of Material Fact Exist

{¶17} There is no dispute of fact that Wilcox hit Devore's truck. The issue in this case is simple: when did Devore begin to turn the truck onto Sharp Road? There are only two witnesses to the series of events leading to Wilcox's impact into the truck. Devore testified he had already started his turn from the eastbound lane of Sycamore Road to Sharp Road when he saw Wilcox crest the hill in the westbound lane of Sycamore Road. Wilcox testified that when he crested the hill, he saw the entire truck in the eastbound lane of Sycamore Road. He saw the truck stopped or moving very slowly in the eastbound lane. He then saw the truck turn into the westbound lane and Wilcox engaged his brakes.

{¶18} In response to the motion for summary judgment, Wilcox presented the expert opinion and deposition testimony of Frederick W. Lickert, a traffic crash reconstructionist. It was Lickert's opinion that Devore failed to yield the right of way before making his left turn onto Sharp Road. In Devore's reply to the motion for summary judgment and the appellate brief, he directs the court's attention to the many alleged flaws in the expert's opinion based on a comparison of Devore's deposition testimony and conflicting evidence in Wilcox's deposition and affidavit. We note Devore did not present its own expert opinion as rebuttal nor did Wilcox file a reply brief to address Devore's contentions regarding the expert's opinion and Devore's alleged conflicting testimony. Even if this Court limits itself to the deposition testimony of the parties who were the only witnesses to the accident, it is abundantly clear that genuine issues of material fact exist as to the cause of the accident.

{¶19} An appeal of a summary judgment gives the appellate court the unique opportunity to step into the shoes of the trial court and review the matter de novo. Summary judgment is appropriate if the party moving for summary judgment establishes that (1) there is no genuine issue of material fact, (2) reasonable minds can come to but one conclusion, which is adverse to the party against whom the motion is made, and (3) the moving party is entitled to judgment as a matter of law. Civ.R. 56; *New Destiny Treatment Ctr., Inc. v. Wheeler*, 129 Ohio St.3d 39, 2011–Ohio–2266, 950 N.E.2d 157, ¶ 24.

{¶20} Upon our review of the parties' sworn deposition testimony and construing said testimony in a light most favorable to the non-moving party, we cannot say that

reasonable minds can come to but one conclusion as to when Devore turned the truck onto Sharp Road.

CONCLUSION

{¶21} The judgment of the Knox County Court of Common Pleas is reversed. The matter is remanded to the trial court for further proceedings consistent with this opinion and law.

By: Delaney, J.,

Gwin, P.J. concur

Farmer, J., dissents.

Farmer, J., dissents

{¶22} I respectfully dissent from the majority's reversal of the trial court's decision to grant summary judgment in favor of appellees.

{¶23} The simple and uncontested fact that is central to the analysis is that Devore's truck was on a separate road (Sharp Road) from Wilcox's course of travel (Sycamore Road). Wilcox applied his brakes when he perceived a potential danger, causing his motorcycle to skid and strike the rear of the Devore truck. Wilcox's reaction was the proximate cause of the accident.

{¶24} I would affirm the trial court's decision.

HON. SHEILA G. FARMER