

[Cite as *Steve Zell Farm Equip., Inc. v. Wagner*, 2010-Ohio-5902.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MIAMI COUNTY**

STEVE ZELL FARM EQUIPMENT, INC. :	:	
	:	Appellate Case No. 2010-CA-1
Plaintiff-Appellee	:	
	:	Trial Court Case No. 09-CV-383
v.	:	
	:	
MICHAEL WAGNER, et al.	:	(Civil Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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OPINION

Rendered on the 3rd day of December, 2010.

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Attorney for Plaintiff-Appellee

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BROGAN, J.

{¶ 1} Appellants Michael and Harold Wagner appeal the decision of the Miami County Court of Common Pleas, granting summary judgment for the Appellee, Steve Zell Farm Equipment, Inc (“Zell”). The Wagners argue that there is a genuine issue of material fact regarding the damages owed, and therefore the Appellee should not be entitled to judgment as a matter of law. The Wagners were unable to show a genuine

issue of material fact, and therefore Zell is entitled to judgment as a matter of law. For the following reasons, we affirm the judgment of the trial court.

I

{¶ 2} On or about March of 2007, Zell entered into an agreement with the Wagners to purchase several pieces of farm equipment, including a John Deere 3230 tractor ("Tractor 1"), a New Holland TC30 tractor ("Tractor 2"), and a John Deere 870 tractor ("Tractor 3"). Zell sold the three tractors to three separate third parties, and found out later that all three tractors were stolen.

{¶ 3} Zell reimbursed the party that bought Tractor 1, and Zell and the Wagners entered into an agreement wherein the Wagners gave Zell other farm equipment which was sold to repay Zell for the money he lost by selling Tractor 1.

{¶ 4} Zell then learned that Tractor 2 and Tractor 3 were also stolen. Zell reimbursed the party he sold Tractor 2 to at the sum of \$10,900. Zell reimbursed the money to the party that bought Tractor 3 for the amount of \$8,200. Zell filed a complaint for breach of contract against the Wagners for the sum of \$19,100, the amount Zell had to reimburse the third parties for Tractor 2 and Tractor 3.

{¶ 5} Zell moved for summary judgment, arguing there were no genuine issues of material fact, and he should be entitled to judgment as a matter of law. On December 9, 2009, the trial court awarded summary judgment to Zell for damages of \$19,100. It is from that decision the Wagners appeal.

II

{¶ 6} The Wagners set forth one assignment of error, which states as follows:

{¶ 7} “THE TRIAL COURT ERRED WHEN IT GRANTED DEFENDANT/APPELLEE’S MOTION FOR SUMMARY JUDGMENT.”

{¶ 8} The Wagners argue that they were able to raise a genuine issue of material fact regarding the damages claimed by Zell. The Wagners contend that since there is a genuine issue of material fact, that Zell should not be awarded judgment as a matter of law.

{¶ 9} Summary judgment is appropriate when: (1) there is no genuine issue as to any 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 party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor. *Harless v. Willis Day Warehousing Co., Inc.*, (1978), 54 Ohio St.2d 64, 66; citing Civ. R. 56(C).

{¶ 10} Upon a motion for summary judgment, the initial burden is on the moving party to show that there is a genuine issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-93. Once a moving party satisfies its burden, “the nonmoving party may not rest upon the mere allegations or denials of the party’s pleadings.” *Murphy v. McDonald’s Restaurants of Ohio, Inc.*, Clark App. No. 2010-CA-4, 2010-Ohio-4761, at ¶ 13, citing *Dresher*, 75 Ohio St.3d at 292-93. “Rather, the burden then shifts to the non-moving party to respond, with affidavits or as otherwise permitted by Civ. R. 56, setting forth specific facts which show that there is a genuine issue of material fact for trial.” *Id.* “Throughout, the evidence must be construed in favor of the non-moving party.” *Id.*

{¶ 11} In the present case, the Wagners put forth no evidence to show there is a genuine issue of material fact regarding damages. Steven Zell testified in an affidavit regarding the agreement between the two parties for Tractor 1, and that Zell was damaged in the sum of \$19,100 for Tractor 2 and Tractor 3. All the Wagners did was claim that Zell’s testimony was incorrect, and they believe that creates a genuine issue of material fact. However, since the Wagners put forth no evidence, either through an affidavit or any other means permissible by Civ. R. 56(C), no genuine issue of material fact was created. Therefore, we uphold the trial court’s granting of summary judgment.

{¶ 12} The Wagners’ assignment of error is overruled.

III

{¶ 13} Appellants’ assignment of error having been overruled, the judgment of the trial court is affirmed.

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GRADY and McFARLAND, JJ., concur.

(Hon. Matthew W. McFarland, Fourth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

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