

[Cite as *Wright v. Norfolk S. Ry. Co.*, 2023-Ohio-2878.]

**COURT OF APPEALS OF OHIO**

**EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA**

WILMA WRIGHT, EXECUTRIX FOR :  
THE ESTATE OF LARRY T. WRIGHT,

Plaintiff-Appellant, : No. 112175

v. :

NORFOLK SOUTHERN RAILWAY :  
COMPANY,

Defendant-Appellee. :

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JOURNAL ENTRY AND OPINION

**JUDGMENT: AFFIRMED**

**RELEASED AND JOURNALIZED: August 17, 2023**

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Civil Appeal from the Cuyahoga County Common Pleas Court  
Case No. CV-21-943341

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***Appearances:***

Eric H. Mann, *for appellant.*

Burns White LLC, Holly M. Olarczuk-Smith, and David A.  
Damico, *for appellee.*

ANITA LASTER MAYS, A.J.:

{¶ 1} Plaintiff-appellant Wilma Wright (“Wilma”), the executrix for the estate of Larry Wright (“Larry”) appeals the trial court’s decision to grant the

defendant-appellee Norfolk Southern Railway Company's ("Norfolk") motion for summary judgment. Although Wilma's wrongful-death claim was not barred by the statute of limitations, she did not set forth specific facts showing that there is a genuine issue for trial with regard to pecuniary damages. We, therefore, affirm the trial court's decision granting Norfolk's motion for summary of judgment.

## **I. Facts and Procedural History**

{¶ 2} Larry began working for Norfolk in 1993 as a brakeman and continued receiving promotions to the positions of conductor and locomotive engineer until he left Norfolk in 2006. Larry was diagnosed with colon cancer in September 2015, and died from its complications on January 29, 2018, after the cancer metastasized to his lungs and brain. In 2017, prior to Larry's death, Larry and Wilma filed for Chapter 7 Bankruptcy and were required to disclose all potential claims against third parties. Larry and Wilma stated that they may have a claim against Norfolk but did not file a claim.

{¶ 3} After Larry's death, Wilma was appointed as executrix for Larry's estate on August 12, 2019. On January 26, 2021, Wilma filed a complaint against Norfolk pursuant to the Federal Employers' Liability Act ("FELA"), alleging that Larry's exposure to toxic fumes and materials during his employment with Norfolk led to his death. On April 26, 2022, Norfolk filed a motion for summary judgment arguing that Wilma's survival claim is barred by the statute of limitations and that Wilma has failed to present evidence in support of her claims of damages under her

wrongful-death claim. On May 26, 2022, Wilma filed an opposition to Norfolk’s motion for summary judgment, and on June 2, 2022, Norfolk filed a reply to Wilma’s opposition.

{¶ 4} On October 27, 2022, the trial court granted Norfolk’s motion for summary judgment. In its decision, the trial court stated that Norfolk is entitled to summary judgment on Wilma’s survival claim because it is barred by the statute of limitations. Additionally, the trial court stated that Norfolk is entitled to summary judgment on Wilma’s wrongful-death claim because Wilma has failed to prove damages.

{¶ 5} In response to the trial court’s decision, Wilma filed this appeal assigning one error for our review:

The trial court was in error in determining there was no genuine issue of material fact for the jury to determine as to whether Wilma Wright sustained economic loss as a result of her husband, Larry Wright’s death.

## II. Standard of Review

{¶ 6} “We review a trial court’s grant of summary judgment de novo.” *Crumb v. LeafGuard by Beldon, Inc.*, 8th Dist. Cuyahoga No. 108321, 2020-Ohio-796, ¶ 22, citing *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336, 671 N.E.2d 241. “In a de novo review, this court affords no deference to the trial court’s decision and we independently review the record to determine whether the denial of summary judgment is appropriate.” *Boucher v. Cleveland*, 8th Dist.

Cuyahoga No. 112079, 2023-Ohio-1818, ¶ 25, citing *Hollins v. Shaffer*, 182 Ohio App.3d 282, 2009-Ohio-2136, 912 N.E.2d 637, ¶ 12 (8th Dist.).

{¶ 7} Summary judgment is appropriate if (1) no genuine issue of any material fact remains; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and construing the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. *Ingram v. Glavin*, 8th Dist. Cuyahoga No. 111931, 2023-Ohio-1290, ¶ 42.

{¶ 8} “The party moving for summary judgment bears the burden of showing that there is no genuine issue of material fact and that he or she is entitled to judgment as a matter of law.” *Id.* at ¶ 43, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 662 N.E.2d 264 (1996).

“Once the moving party satisfies its burden, the nonmoving party ‘may not rest upon the mere allegations or denials of the party’s pleadings, but the party’s response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.’”

*Id.*, quoting Civ.R. 56(E); *Mootispaw v. Eckstein*, 76 Ohio St.3d at 385, 667 N.E.2d 1197 (1996).

{¶ 9} “A fact is material if it ‘might affect the outcome of the suit under the governing law’ of the case.” *Id.* at ¶ 44, quoting *Okon v. Cleveland Div. of Police*, 8th Dist. Cuyahoga No. 110025, 2021-Ohio-2931. “A factual dispute is ‘genuine’ only if

‘it allows reasonable minds to return a verdict for the nonmoving party.’” *Id.*, quoting *Huntington Natl. Bank v. Blount*, 8th Dist. Cuyahoga No. 98514, 2013-Ohio-3128, ¶ 32.

### **III. Law and Analysis**

{¶ 10} In Wilma’s sole assignment of error, she argues that the trial court erred by granting Norfolk’s motion for summary judgment. More specifically, Wilma contends that there is a genuine issue of material fact for determination by the jury as to whether she sustained economic or pecuniary loss related to her wrongful-death claim.<sup>1</sup>

#### **A. Pecuniary Loss**

{¶ 11} In its order granting Norfolk’s motion for summary judgment, the trial court stated that Wilma “has presented only speculation and guesswork that she suffered a pecuniary loss.” The trial court also stated that Wilma “has failed to present any Civ.R. 56 evidence to support” the assertions that she suffered a “pecuniary loss in the form of” Larry’s salary as a pastor “and in [his] ability to make household repairs and improvements.” The trial court stated, “[W]ithout this evidence, this court is left to guess and speculate the nature of [Wilma’s] pecuniary loss.” The trial court ruled that Wilma is required to “set forth specific facts showing

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<sup>1</sup> Wilma’s brief addressed the statute of limitations as it related to wrongful death. However, the wrongful-death claim survived the statute of limitations during the pretrial stages and the analysis moved to economic or pecuniary loss. Therefore, the wrongful-death claim is not reviewable because the trial court’s summary judgment decision did not address this issue.

that there is a genuine issue for trial,” and that Wilma “has not met her burden under this rule.”

{¶ 12} Wilma, however, argues that during her deposition testimony and supplement discovery, she provided, with specificity, the economic loss she suffered as a result of her husband’s death. Wilma argues that she lost her husband’s income from his employment as a pastor and Larry’s monthly pension from the Railroad Retirement Board.

{¶ 13} However, in Wilma’s response in opposition to Norfolk’s motion for summary judgment, she did not state that she had any pecuniary damages. While Wilma included a notice of bankruptcy case filing with the trial court, she did not specify the amount of damages she was requesting. She never relied on, cited to, or argued that the bankruptcy petition supported her claim of pecuniary loss, and she never submitted her affidavit at the summary-judgment stage. Additionally, Wilma did not raise the issue of the loss of Larry’s pension or his pastoral income.

{¶ 14} Further, Wilma has not demonstrated that the trial court erred in its decision stating that she failed to raise a genuine issue of fact with regard to pecuniary damages. On this appeal, she has demonstrated with specificity the loss of her husband’s employment income of \$234.16, and the railroad pension income of \$1,348 per month. However, these arguments are waived because she did not raise them before the trial court. *See, e.g., Deacon v. Deacon*, 8th Dist. Cuyahoga No. 91609, 2009-Ohio-2491, ¶ 33, citing *In re Gibson*, 61 Ohio St.3d at 171, 573

N.E.2d 1074 (1991) (party's failure to raise argument in trial court waives the argument on appeal); *Cross v. Cross*, 12th Dist. Preble No. CA2008-07-015, 2009-Ohio-1309 (“[I]t is axiomatic that failing to raise an issue at the trial court level waives any error on appeal.”). Therefore, the trial court did not err in granting Norfolk’s motion for summary judgment.

**{¶ 15}** Judgment affirmed.

It is ordered that appellee recover from appellant 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 common pleas court to carry this judgment into execution.

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

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ANITA LASTER MAYS, ADMINISTRATIVE JUDGE

MICHELLE J. SHEEHAN, J., and  
MARY J. BOYLE, J., CONCUR