

**IN THE COURT OF APPEALS  
ELEVENTH APPELLATE DISTRICT  
GEAUGA COUNTY, OHIO**

|                           |   |                             |
|---------------------------|---|-----------------------------|
| GEORGE NOCENTE,           | : | <b>O P I N I O N</b>        |
| Plaintiff-Appellant,      | : |                             |
| - vs -                    | : | <b>CASE NO. 2009-G-2928</b> |
| LOIS A. FISHBACK, et al., | : |                             |
| Defendants-Appellees.     | : |                             |

Civil Appeal from the Court of Common Pleas, Case No. 07 P 0001298.

Judgment: Affirmed.

*Elliott I. Resnick*, Elliott I. Resnick & Co., L.P.A., LaPlace Mall, 2nd Floor, 2101 Richmond Road, Beachwood, OH 44122 (For Plaintiff-Appellant).

*Dennis R. Fogarty*, Davis and Young, L.P.A., 1200 Fifth Third Center, 600 Superior Avenue, East, Cleveland, OH 44114-2654 (For Defendants-Appellees).

MARY JANE TRAPP, P.J.

{¶1} Mr. George Nocente appeals the decision of the Geauga County Court of Common Pleas granting summary judgment to Ms. Lois A. Fishback on Mr. Nocente's claims arising from an automobile accident in which he was struck by a passing car while working on a repaving project. We affirm the trial court's judgment as the record before us demonstrates the absence of a genuine issue of fact on a material element of Mr. Nocente's claim.

{¶2} **Substantive and Procedural History**

{¶3} On August 3, 2004, Mr. Nocente was struck by an automobile while he was working for his employer repaving Music Street in Newbury Township.

{¶4} As Music Street is a narrow road, the construction required drivers to drop their tires completely off the road onto the berm to maneuver around the lane in which Mr. Nocente was working. Mr. Nocente, with his left arm extended, was guiding trucks toward another road machine, which allowed those trucks to dump material on the road. Suddenly a vehicle caught his elbow, and threw him backwards. He landed on his arm and hip, and bounced back upright. Holding his arm, he crossed the ditch to the side of the road, and saw the rear of a white 4x4 Jeep Cherokee heading eastbound. Mr. Nocente never saw Ms. Fishback's approach, did not know if she violated any traffic laws, and did not disagree with the unfilled and incomplete police report that she was driving ten miles per hour.

{¶5} The officer directing traffic on the westbound end of the project was Police Chief Sonny Battaglia, who is now retired. After flagging "any number of cars," he heard a commotion and a man screaming "a guy got hit." Chief Battaglia observed Mr. Nocente bent over, clenching his arm. Mr. Nocente told him he had been struck by a car mirror, prompting Chief Battaglia to radio the other officer to stop the only automobile that was passing through at that moment in time, which was that of Ms. Fishback. By the time he observed Ms. Fishback driving, her tires were already completely on the blacktop. When he questioned her, he honestly believed she did not know an impact had occurred. Chief Battaglia could not opine whether she was negligent, but stated that if she, like others, would stay on the rough berm, the accident would not have occurred.

{¶6} Ms. Fishback denied hitting anyone when the police pulled her over. She did not recall any other vehicles to her front or back, but recalled seeing Mr. Nocente. She described him as the man working on the running board of the truck, talking to the driver, and standing very near the middle of the road. Ultimately, she was not issued a citation because Chief Battaglia could not say beyond a reasonable doubt that she did anything wrong. After the officer told her that he doubted anything would come of this, but that she should do so, Ms. Fishback filed a claim with her insurance company.

{¶7} Mr. Nocente declined the assistance of an ambulance for his injured arm. Several hours later, however, the pain caused him to seek medical care at Geauga Hospital. He was referred for more treatment at the Cleveland Clinic, visiting several doctors for the pain in his shoulder and arm, and the muscle spasms that were occurring along his neck and shoulder, which grew worse over the next two to three weeks. Ultimately, Mr. Nocente required back surgery.

{¶8} Mr. Nocente filed a complaint alleging Ms. Fishback negligently operated her vehicle and that her husband negligently entrusted his vehicle to her.

{¶9} Ms. Fishback filed a motion for summary judgment, supported by Mr. Nocente's deposition, pictures of the automobile, as well as affidavits from Ms. Fishback, and her friend and passenger, Ms. Nancy Haag. Both Ms. Fishback and Ms. Haag averred that Ms. Fishback had been driving approximately ten miles per hour, she did not cross yellow lines when she was maneuvering around the construction workers, and they did not see or hear the vehicle strike anyone.

{¶10} Mr. Nocente responded with a brief in opposition, supported by his own deposition and those of Ms. Fishback and Chief Battaglia, together with pictures of the mirror.

{¶11} The court granted Ms. Fishback's motion for summary judgment, finding that "no reasonable person could find Ms. Fishback at fault" as "they would be guessing or speculating." The court placed emphasis on Chief Battaglia's testimony that the last person in the lane is simply assumed to be the party involved in any accident of this type, and that the misadjusted mirror found on Ms. Fishback's vehicle was simply not enough evidence upon which one could infer Ms. Fishback was negligent. Thus, the court held that there is "no direct evidence sufficient to permit an inference upon which a reasonable person could conclude that [Ms. Fishback] was negligent."

{¶12} Mr. Nocente raises one assignment of error for our review:

{¶13} "The trial court committed prejudicial error in granting Defendants-Appellees' Motion for Summary Judgment, finding that no reasonable person could find that Defendant was at fault and that there is no direct evidence sufficient to permit an inference upon which a reasonable person could conclude that Defendant was negligent, where there is sufficient testimony that Plaintiff-Appellant, while standing in the eastbound lane, was struck by a white automobile's mirror and that at the moment in time that Plaintiff-Appellant was struck Defendant-Appellee, Lois Fishback, was the only car that went through the construction area, after being directed to drive in the westbound lane until she cleared a construction zone."

**{¶14} Summary Judgment Standard of Review**

{¶15} "Pursuant to Civ.R. 56(C), summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Holik v. Richards*, 11th Dist. No. 2005-A-0006, 2006-Ohio-2644, ¶12, citing *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. In addition, it must appear from the evidence and stipulations that reasonable minds can come to only one conclusion,

which is adverse to the nonmoving party. *Id.*, citing Civ.R. 56(C). Further, the standard in which we review the granting of a motion for summary judgment is *de novo*. *Id.*, citing *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105.” *Welch v. Zicarelli*, 11th Dist. No. 2006-L-229, 2007-Ohio-4374, ¶36.

{¶16} “Accordingly, ‘[s]ummary judgment may not be granted until the moving party sufficiently demonstrates the absence of a genuine issue of material fact. The moving party bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party’s claim.’ *Brunstetter v. Keating*, 11th Dist. No. 2002-T-0057, 2003-Ohio-3270, ¶12, citing *Dresher* at 292. Once the moving party meets the initial burden, the nonmoving party must then set forth specific facts demonstrating that a genuine issue of material fact does exist that must be preserved for trial, and if the nonmoving party does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party. *Id.*, citing *Dresher* at 293.” *Id.* at ¶37.

{¶17} “Since summary judgment denies the party his or her ‘day in court’ it is not to be viewed lightly as docket control or as a ‘little trial.’ The jurisprudence of summary judgment standards has placed burdens on both the moving and the nonmoving party. In *Dresher v. Burt*, the Supreme Court of Ohio held that the moving party seeking summary judgment bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record before the trial court that demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party’s claim. The evidence must be in the record or the motion cannot succeed. The moving party cannot discharge its initial burden under Civ.R. 56 simply

by making a conclusory assertion that the nonmoving party has no evidence to prove its case but must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) that affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. If the moving party has satisfied its initial burden, the nonmoving party has a reciprocal burden outlined in the last sentence of Civ.R. 56(E) to set forth specific facts showing there is a genuine issue for trial. If the nonmoving party fails to do so, summary judgment, if appropriate shall be entered against the nonmoving party based on the principles that have been firmly established in Ohio for quite some time in *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112.

{¶18} “The court in *Dresher* went on to say that paragraph three of the syllabus in *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, \*\*\* is too broad and fails to account for the burden Civ.R. 56 places upon a moving party. The court, therefore, limited paragraph three of the syllabus in *Wing* to bring it into conformity with *Mitseff*.

{¶19} “The Supreme Court in *Dresher* went on to hold that when neither the moving nor nonmoving party provides evidentiary materials demonstrating that there are no material facts in dispute, the moving party is not entitled to a judgment as a matter of law as 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 which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party’s claim.’ *Id.* at 276.” *Ziccarelli* at ¶40-42.

**{¶20} A Prima Facie Case of Negligence**

{¶21} In his sole assignment of error, Mr. Nocente contends the trial court erred in awarding summary judgment in favor of Ms. Fishback. Specifically, Mr. Nocente argues there was sufficient evidence that Ms. Fishback was the driver of the vehicle that struck him, and she was negligent in doing so.

{¶22} “In order to establish an actionable claim for negligence, the plaintiff must establish: (1) the defendant owed a duty to him; (2) the defendant breached that duty; (3) the defendant’s breach of duty proximately caused his injury; (3) the defendant’s breach of duty proximately caused his injury; and (4) he suffered damages.” *Cosimi v. Koski Constr. Co.*, 11th Dist. No. 2008-A-0075, 2009-Ohio-5892, ¶42 (citations omitted).

{¶23} The evidence before the trial court, even when construed most strongly in Mr. Nocente’s favor, fails to establish the existence of a genuine issue of material fact. No one personally observed Ms. Fishback drive through the single lane of construction. Chief Battaglia directed her to enter, and testified that she properly drove through the narrow lane with her tires off the berm. When he turned around after Mr. Nocente’s fall, he observed she was the last vehicle to drive through the construction lane, which prompted him to radio the other officer to pull her over and question her. After speaking with her, he honestly believed that she did not know if she struck Mr. Nocente. Her passenger, Ms. Haag, averred in her affidavit that she did not see or hear Ms. Fishback strike anyone. Finally, Mr. Nocente did not see who struck him, testifying only that he saw a white automobile exiting the construction zone after he bounced up from his fall and crossed the ditch. Ms. Fishback testified, and Mr. Nocente agreed, that Ms. Fishback was driving at approximately ten miles per hour.

{¶24} Mr. Nocente testified that at the time he was struck, he was guiding a truck. He recalled that his left arm was extended, an automobile caught it, and he was

thrown back from the force. He believes he was struck inside the construction zone, but he never saw the automobile come into his lane or cross the yellow line, and did not know if any traffic laws were violated.

{¶25} While Chief Battaglia testified that “everyone is going to blame the last car that went through there,” and then made the general remark that “if Ms. Fishback, like others, would have stayed in that rough berm, the accident wouldn’t have occurred,” the fact is he did not know if she left the berm and drove into the construction zone.

{¶26} Thus, we agree with the trial court that the only direct evidence in this case, the misadjusted mirror, is not enough from which to infer that Ms. Fishback struck Mr. Nocente with her automobile, or even if so, that she was negligently driving through the construction zone.

{¶27} While we are mindful that summary judgment denies a party his or her “day in court” and is not to be viewed lightly as docket control or as a “little trial,” we agree with the trial court that speculation and conjecture alone will not send this case to a jury.

{¶28} The judgment of the Geauga County Court of Common Pleas is affirmed.

CYNTHIA WESTCOTT RICE, J.,

COLLEEN MARY O’TOOLE, J.,

concur.