[Cite as *Motorists Mut. Ins. Co. v. Flugan*, 2010-Ohio-3037.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

MOTORISTS MUTUAL INSURANCE CO., et al.

Plaintiffs-Appellants

-vs-

RUTH FLUGAN

Defendant-Appellee

JUDGES:
Hon. Julie A. Edwards, P. J.
Hon. John W. Wise, J.
Hon. Patricia A. Delaney, J.

Case No. 2010 CA 00055

<u>O P I N I O N</u>

CHARACTER OF PROCEEDING: Civil Appeal from the Alliance Municipal Court, Case No. 09 CVE 871

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: June 30, 2010

APPEARANCES:

For Plaintiffs-Appellants	For Defendant-Appellee
A. KATHLEEN KADUK KEIS GEORGE, LLP 55 Public Square, Suite 800 Cleveland, Ohio 44113	RUTH FLUGAN PRO SE 1835 South Freedom Avenue Alliance, Ohio 44601

Wise, J.

{¶1} Appellant Motorists Mutual Insurance Company appeals the decision of the Alliance Municipal Court, Stark County, which denied appellant's motion for summary judgment and ultimately granted judgment in favor of Appellee Ruth Flugan in a negligence action. The relevant facts leading to this appeal are as follows.

{¶2} On or about November 16, 2008, Jessica Polverine, appellant's insured, was involved in an automobile accident on South Freedom Avenue in Alliance, Ohio. Appellant thereafter paid the sum of $3,316.71 to Polverine under its contract, and thus became subrogated to the extent of its payment.

{¶3} June 5, 2009, Appellant Motorists Mutual and Polverine filed a negligence complaint in the Alliance Municipal Court against Appellee Flugan, based on the theory that appellee had allegedly partially pulled her vehicle into the roadway and caused Polverine to swerve and strike an object off the road. Appellee filed a pro se answer on September 28, 2009.

{¶4} On November 16, 2009, appellant propounded written discovery requests to appellee, including interrogatories, requests for production, and requests for admissions. On December 31, 2009, appellant filed a motion for summary judgment, alleging therein that appellee had not complied with the aforementioned requests for admissions. Appellee did not file a response to the summary judgment motion.

{¶5} On January 26, 2010, the trial court conducted a hearing on appellant's summary judgment motion. On the same day, the court issued a hand-written judgment entry denying appellant's motion for summary judgment. The entry reads: "Case called. Plaintiff, its counsel, and Jessica Polverine did not appear. Defendant, Ruth Flugan,

appeared. It is ordered that the Plaintiff's Motion for Summary Judgment is denied. Clerk to notify."

{¶6} The case proceeded to a bench trial on February 2, 2010. After hearing the evidence, the trial court found in favor of appellee and granted judgment accordingly. A judgment entry based on the trial was filed February 4, 2010.

{¶7} On March 4, 2010, appellant filed a notice of appeal. Appellant also asked the court to issue a type-written judgment entry concerning its earlier summary judgment ruling. The court prepared and filed such entry on March 8, 2010.

{¶8} Appellant herein raises the following sole Assignment of Error:

{¶9} "I. THE TRIAL COURT ERRED WHEN IT DENIED PLAINTIFF-APPELLANTS' UNOPPOSED MOTION FOR SUMMARY JUDGMENT BASED UPON THE DEFENDANT-APPELLEE'S FAILURE TO RESPOND TO REQUESTS FOR ADMISSIONS.

{¶10} "II. THE TRIAL COURT ERRED WHEN IT ISSUED A NEW JUDGMENT ENTRY ON MARCH 8, 2008 (SIC), AFTER THE TRIAL OF THIS MATTER CITED (SIC) NEW AND DIFFERENT REASONS FOR DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT."

I.

{¶11} In its First Assignment of Error, appellant contends the trial court erred in denying its unopposed summary judgment motion. We disagree.

{¶12} As an initial matter, we note the trial court heard evidence at trial in this matter, subsequent to the denial of summary judgment. Arguably, this rendered the present issue moot. See *True Light Christian Ministries Church v. Clear Channel*

Outdoor, Inc., 157 Ohio App.3d 198, 2004-Ohio-2539, ¶ 23. Nonetheless, in the interest of justice, we will proceed to the merits of the assigned error.

{¶13} Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 36, 506 N.E.2d 212. As such, we must refer to Civ.R. 56 which provides, in pertinent part: "Summary judgment shall be rendered forthwith if the pleadings, 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 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."

{¶14} Pursuant to the above rule, a trial court may not enter summary judgment if it appears a material fact is genuinely disputed. The party moving for summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. The moving party may not make a conclusory assertion that the non-moving party has no evidence to prove its case. The moving party must specifically point to some evidence which demonstrates the non-moving party cannot support its claim. If the moving party satisfies this requirement, the burden shifts to the non-moving

party to set forth specific facts demonstrating there is a genuine issue of material fact for trial. *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 429, 674 N.E.2d 1164, citing *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 662 N.E.2d 264.

{¶15} Appellant first directs us to the issue of the admissions requests as related to the denial of the summary judgment motion. In *Cleveland Trust Co. v. Willis* (1985), 20 Ohio St.3d 66, 67, the Ohio Supreme Court stated: "Civ.R. 36 requires that when requests for admissions are filed by a party, the opposing party must timely respond either by objection or answer. Failure to respond at all to the requests will result in the requests becoming admissions. Under compelling circumstances, the court may allow untimely replies to avoid the admissions. *** A request for admission can be used to establish a fact, even if it goes to the heart of the case. This is in accord with the purpose of the request to admit -- to resolve potentially disputed issues and thus to expedite the trial."

{¶16} Appellant urges that all of the elements of its automobile negligence claim have been established by the failure of appellee to respond to the admissions request; thus, appellant argues, summary judgment should have been granted in its favor. For example, admission number 9 states that the damages "were the direct and proximate result of the negligence of Defendant Ruth A. Flugan." Appellant also points out that appellee submitted no Civ.R. 56(E) evidence in opposition to the motion for summary judgment, particularly evidence to contradict appellant's counsel's affidavit that appellee had been served with the requests for admissions and had not responded. Appellant, citing *Carrabine Construction v. Chrysler Realty Corp*. (1986), 25 Ohio St.3d 222, maintains that a trial court may not consider supplemental oral testimony at a hearing

on a motion for summary judgment. In the case sub judice, the trial court inquired of appellee, who was pro se, as to whether she had received the requests for admissions. After hearing from her, the court "was satisfied she had not [received them]" Judgment Entry, March 8, 2010, at 1. Because this colloquy was more akin to an inquiry of counsel on a procedural matter as opposed to a factual averment, we find the rationale of *Carrabine* inapplicable, and the court was free to determine that no matters had been deemed admitted. Because appellant's summary judgment motion was based almost exclusively on the claimed admissions of appellee, we find appellant failed to meet its summary judgment burden under *Dresher*, supra.

{¶17} We therefore find summary judgment in favor of appellant was properly denied as a matter of law.

{¶18} Appellant's First Assignment of Error is overruled.

II.

{¶19} In its Second Assignment of Error, appellant contends the trial court erred in issuing a new judgment entry on March 8, 2010 regarding the summary judgment denial. We disagree.

{¶20} Appellant concedes that it made the request for a type-written judgment entry pursuant to this Court's Loc.App.R. 9(B)(1). Appellant first contends that the court had no jurisdiction to issue an expanded judgment entry as to the summary judgment denial after the notice of appeal had been filed. However, we find the court's action is not inconsistent with our jurisdiction and is protected as a ruling in furtherance of pending appeal.

{¶21} Appellant secondly maintains that in general terms the trial court erroneously expanded the summary judgment denial beyond what was mentioned in the original hand-written entry. However, the denial of a motion for summary judgment generally is considered an interlocutory order not subject to immediate appeal. *Stevens v. Ackman,* 91 Ohio St.3d 182, 186, 743 N.E.2d 901, 2001-Ohio-249. Furthermore, as an appellate court, we indulge in all reasonable presumptions in favor of the regularity of the proceedings below. See *Channelwood v. Fruth* (June 10, 1987), Summit App.No. 12797, citing *In Re Sublett* (1959), 169 Ohio St. 19, 20, 157 N.E.2d 324. As such, we find no basis for holding that the trial court committed reversible error by clarifying the reasoning for its interlocutory denial of summary judgment via the March 8, 2010 entry.

{¶22} Appellant's Second Assignment of Error is therefore overruled.

{¶23} For the reasons stated in the foregoing opinion, the judgment of the Alliance Municipal Court, Stark County, Ohio, is affirmed.

By: Wise, J.

Delaney, J., concurs.

Edwards, P. J., concurs separately.

/S/ JOHN W. WISE____________________

/S/ PATRICIA A. DELANEY_____________

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JUDGES

JWW/d 0604

EDWARDS, P.J., CONCURRING OPINION

{¶24} I concur with the majority's analysis and disposition of appellant's first assignment of error.

{¶25} However, while I concur with the majority's disposition of appellants' second assignment of error, I do so for a different reason. The trial court, in its February, 4, 2010, Judgment Entry, indicated that it had denied the Motion for Summary Judgment because appellants did not appear on the day the motion was set for hearing. It further stated that it had denied appellants' motion to have their request for admissions admitted as true because appellee did not receive the same. Thus, the finding made by the trial court, in its March 8, 2010, Judgment Entry, that the entire basis for appellants' Motion for Summary Judgment was that appellee had not answered the requests for admissions and that, because appellee had not received the same, the trial court was denying appellants' Motion for Summary Judgment, was harmless if it were error at all. Moreover, as noted by the majority, our review of a Motion for Summary Judgment is de novo. Thus, the reasons given by the trial court for denying the Motion for Summary Judgment are not dispositive.

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Judge Julie A. Edwards

JAE/dr/rmn

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

MOTORISTS MUTUAL INSURANCE CO., et al.	:	
Plaintiffs-Appellants	:	
-vs-	:	JUDGMENT ENTRY
RUTH FLUGAN	:	
Defendant-Appellee	:	Case No. 2010 CA 00055

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Alliance Municipal Court, Stark County, Ohio, is affirmed.

Costs assessed to Appellant Motorists Mutual.

/S/ JOHN W. WISE

/S/ JULIE A. EDWARDS

/S/ PATRICIA A. DELANEY

JUDGES