

[Cite as *Miller v. Mangan*, 2013-Ohio-2659.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

| | | |
|---|---|----------------------------|
| Kevin Miller, | : | |
| | : | |
| Plaintiff-Appellant, | : | |
| | : | No. 12AP-616 |
| v. | : | (C.P.C. No. 11CVC-01-1004) |
| | : | |
| Patrick F. Mangan, Administrator of the | : | (REGULAR CALENDAR) |
| Estate of Arthur S. Vogle, Deceased et al., | : | |
| | : | |
| Defendants-Appellees. | : | |
| | : | |

D E C I S I O N

Rendered on June 25, 2013

Malek & Malek, and James Malek, for appellant.

Gallagher, Gams, Pryor, Tallan & Littrell, LLP, Belinda S. Barnes, and Benjamin W. Wright, for appellee Patrick F. Mangan, Administrator of the Estate of Arthur S. Vogle, Deceased.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶ 1} Plaintiff-appellant, Kevin Miller, appeals from a judgment of the Franklin County Court of Common Pleas granting summary judgment in favor of defendant-appellee, Patrick F. Mangan, Administrator of the Estate of Arthur S. Vogle, Deceased. For the following reasons, we reverse the judgment of the trial court and remand the matter to that court for further proceedings consistent with this decision.

I. BACKGROUND

{¶ 2} This case arises out of a two-vehicle accident between appellant and Arthur S. Vogle ("Vogle"). Appellant filed a complaint against Vogle alleging that the accident was caused by Vogle's negligent operation of his vehicle and that appellant suffered injury and damages as a result. Appellant also alleged that Vogle was negligent per se due to operating "a motor vehicle in such a manner as to violate" Ohio's traffic laws. (Amended Complaint, ¶ 16.) Appellant alleged negligent entrustment and respondeat superior against John Doe defendants.

{¶ 3} Prior to filing an answer to the lawsuit, counsel for Vogle notified the court that Vogle had died.¹ The trial court granted Vogle's motion to substitute the administrator of the estate for the deceased defendant Vogle. Appellant filed an amended complaint substituting appellee for Vogle.

{¶ 4} Pursuant to Civ.R. 56(C), appellee filed a motion for summary judgment and cited portions of appellant's deposition transcript to support the motion. Appellant filed a memorandum in opposition and attached with it an affidavit he executed in order to support his negligence claims against Vogle. The trial court granted appellee's motion for summary judgment on grounds that appellee satisfied his burden under Civ.R. 56 to show that there were no genuine issues of material fact and that he was entitled to judgment as a matter of law. The court also concluded that appellant improperly attempted to defeat summary judgment "with a self-serving affidavit that is contrary to his previous deposition testimony." (R. 38, 7.)

II. ASSIGNMENTS OF ERROR

{¶ 5} Appellant filed a timely notice of appeal and assigns the following as error:

[I.] The trial court erroneously granted defendant-appellees' motion for summary judgment because genuine issues of material fact remain which should properly be decided by a jury.

[II.] The trial court erroneously refused to consider the Affidavit of the Plaintiff-Appellant when applying the Summary Judgment standard which requires that evidence

¹ Vogle's death was unrelated to the accident with appellant.

be interpreted in the light most favorable to the non-moving party.

III. DISCUSSION

A. First Assignment of Error

{¶ 6} In his first assignment of error, appellant argues that the trial court erred by granting summary judgment in favor of appellee. We agree.

{¶ 7} We review a summary judgment motion de novo. *Cashlink, LLC v. Mosin, Inc.*, 10th Dist. No. 12AP-395, 2012-Ohio-5906, ¶ 14. When an appellate court reviews a trial court's disposition of a summary judgment motion, it applies the same standard as the trial court and conducts an independent review, without deference to the trial court's determination. *Id.* We must affirm the trial court's judgment if any grounds the movant raised in the trial court support it. *Id.*

{¶ 8} Pursuant to Civ.R. 56(C), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, 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." Accordingly, summary judgment is appropriate only under the following circumstances: (1) no genuine issue of material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion, that conclusion being adverse to the nonmoving party. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66 (1978).

{¶ 9} "[T]he 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 (1996). "The requirement that a party seeking summary judgment disclose the basis for the motion and support the motion with evidence is well founded in Ohio law.' "

Vahila v. Hall, 77 Ohio St.3d 421, 429 (1997), quoting *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 115 (1988).

{¶ 10} Thus, the moving party may not fulfill its initial burden simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case. *Dresher* at 293. Rather, the moving party must support its motion by pointing to some evidence of the type set forth in Civ.R. 56(C), which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. *Id.* Bare allegations by the moving party are insufficient to satisfy the party's initial burden. *Vahila* at 430. The evidence upon which the moving party relies must be in the record or the motion cannot succeed. *Dresher* at 293. If the moving party fails to sustain its initial burden, the court must deny the motion for summary judgment. *Id.*

{¶ 11} Although appellee attempted to meet the burden in his summary judgment motion by referring to portions of appellant's deposition testimony, the deposition at issue was, in fact, not part of the record before the trial court. When appellee filed a motion to supplement the appellate record with the transcript of appellant's deposition, this court denied it because "[a]ppellate review is limited to the record as it existed at the time that the trial court rendered its judgment," and "[a] reviewing court cannot add matter to the record before it, which was not part of the trial court's proceedings, and then decide the appeal on the basis of the new matter." (Citations omitted.) *Aronhalt v. Castle*, 10th Dist. No. 12AP-196, 2012-Ohio-5666, ¶ 13.

{¶ 12} Consequently, the deposition cannot be considered as evidence in support of appellee's motion for summary judgment. While the record contains an affidavit that appellant submitted to oppose the summary judgment motion, we need not consider whether anything in that affidavit supports appellee's motion for summary judgment because the burden was on appellee to provide supporting evidence in the first instance. *Krueck v. Kipton Village Council*, 9th Dist. No. 11CA009960, 2012-Ohio-1787, ¶ 10. Appellee failed to meet that burden by not providing support for his motion for summary judgment. Accordingly, appellant's first assignment of error is sustained.

B. Second Assignment of Error

{¶ 13} In his second assignment of error, appellant argues that the trial court erroneously disregarded the affidavit attached to his memorandum in opposition to appellee's motion for summary judgment. Our disposition of appellant's first assignment of error renders appellant's second assignment of error moot.

IV. CONCLUSION

{¶ 14} In summary, we sustain appellant's first assignment of error and render moot appellant's second assignment of error. Having sustained appellant's first assignment of error, the judgment of the Franklin County Court of Common Pleas is reversed, and this cause is remanded to that court for further proceedings consistent with this decision.

*Judgment reversed;
cause remanded.*

KLATT, P.J., and DORRIAN, J., concur.
