

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

JONATHAN GARRISON by and	:	APPEAL NOS. C-120409
through his mother TAMMY	:	C-120413
GARRISON,	:	TRIAL NO. A-0906541
Plaintiff-Appellant,	:	<i>JUDGMENT ENTRY.</i>
and	:	
TAMMY AND BRIAN GARRISSON, et	:	
al.,	:	
Plaintiffs,	:	
and	:	
ZACHARY SCHMIDT, by and through	:	
his natural guardians DEWEY and	:	
ANGELA SCHMIDT,	:	
Third-Party Defendant-Appellant,	:	
vs.	:	
MICHAEL ADLER,	:	
and	:	
COLERAIN TOWNSHIP TRUSTEES,	:	
Defendants-Appellees,	:	
and	:	
21st CENTURY INSURANCE	:	
COMPANY, et al.,	:	
Defendants.	:	

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We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* S.Ct.R.Rep.Op. 2; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Plaintiff-appellant Jonathan Garrison and third-party defendant-appellant Zachary Schmidt appeal the trial court's grant of summary judgment in favor of defendant-appellees Michael Adler and the Colerain Township Trustees ("the Trustees"). For the following reasons, we affirm.

This case involves an automobile accident that occurred when defendant Dominic Cavallaro, driving a GMC Jimmy carrying passengers Garrison and Schmidt, made a left-hand turn in front of Adler, who was driving a Colerain Township Fire Department F-150 truck on a road with a posted speed limit of 45 m.p.h. Garrison and Schmidt made a claim of negligence against Adler and the Trustees for the injuries they had suffered in the car accident. Essentially Garrison and Schmidt argue that Adler, an employee of the Colerain Township Fire Department and thus, an employee of the Trustees, was negligent in operating his truck and contributed to the accident by speeding and not taking actions to avoid the collision when Adler had the opportunity to do so. Adler and the Trustees moved for summary judgment against all parties in the lawsuit arguing that they were immune from liability under R.C. Chapter 2744, Ohio's Political Subdivision Tort Liability statute. The trial court agreed and entered summary judgment in their favor.

In their appeal, Garrison and Schmidt maintain in a single assignment of error, that the trial court erred in granting summary judgment in favor of Adler and the Trustees. We review the granting of summary judgment *de novo*, applying the standards set forth in Civ.R. 56(C).

With respect to the Trustees, the parties agree that the Trustees are immune from liability unless Adler had negligently operated his truck. *See* R.C. 2744.02(A)(1); R.C. 2744.02(B)(1).

To establish negligence, a plaintiff must show the existence of a duty, the breach of that duty, and an injury proximately caused by the breach. *Armstrong v. Best Buy Co.*, 99 Ohio St.3d 79, 2003-Ohio-2573, 788 N.E.2d 1088, ¶ 8. Generally, there is a preference for the rights of the driver with the statutory right of way over drivers that are subject to a statutory duty to yield, as long as the motorist with the right of way is proceeding in a lawful manner. Still, the motorist with the right of way must use ordinary care not to injure another driver who has blocked the right of way and has created a perilous condition. *Deming v. Osinski*, 24 Ohio St.2d 179, 265 N.E.2d 554 (1970). “Even under the common law duty to exercise ordinary care to avoid a collision, the contributory or comparative negligence of the driver with the right of way does not become a [factual] issue for trial without evidence that the driver with the right of way was also driving unlawfully.” *Wallace v. Hipp*, 6th Dist. No. L-11-1052, 2012-Ohio-623, ¶ 16-17, citing *Holding v. Chapel*, 41 Ohio App.3d 250, 252, 535 N.E.2d 350 (9th Dist.1987).

Garrison and Schmidt argue that Adler was not proceeding in a lawful manner because he was speeding, and thus a question of fact as to Adler’s “comparative negligence” remained. But there was no proper evidence presented that Adler was speeding or driving unlawfully. Garrison and Schmidt point to Adler’s statement to the investigating officer that he had been driving between 45 and 55 m.p.h. prior to the accident. But Adler testified in his deposition that he had told the investigating officer that that was a guess, and that he had not looked at the

speedometer. He testified that he normally drives the speed limit and believed he was travelling 45 m.p.h. prior to the accident.

Next, Garrison and Schmidt rely on the affidavit of Neil Gilreath, their accident-reconstruction expert, who opined that to a “reasonable degree of accident reconstruction certainty, the vehicle driven by defendant, Michael Adler, was traveling far greater than the posted speed limit of 45 m.p.h. when the brakes were first applied” and that Adler “could have safely stopped his vehicle if he was traveling 55 m.p.h. or less.” But these statements are inconsistent with Gilreath’s previous deposition testimony. Gilreath testified at his previous deposition that (1) “he had no reason to believe that Mr. Adler * * * was not traveling along the roadway at the posted speed limit;” (2) that given that Adler had not seen the other vehicle until he was 75 feet away from it, Adler could not have stopped his truck in time even if he had been traveling at or under the posted speed limit; and (3) that he had made no determination as to the speed Adler was traveling prior to impact.

The Ohio Supreme Court has held that when an inconsistent affidavit is presented in support of, or in opposition to a motion for summary judgment, a trial court must consider whether the affidavit contradicts or merely supplements the affiant’s earlier sworn testimony. *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, 850 N.E.2d 47, ¶ 26. A nonmoving party’s contradictory affidavit, “may not, without sufficient explanation, create a genuine issue of material fact to defeat the motion for summary judgment.” *Id.* at ¶ 28; *see also Pettiford v. Aggarwai*, 126 Ohio St.3d 413, 2010-Ohio-3237, 934 N.E.2d 913, ¶ 41.

Here, the record demonstrates that the trial court considered whether Gilreath’s affidavit contradicted or merely supplemented his prior deposition testimony as it heard oral argument on this matter below. Further, Gilreath’s

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deposition testimony directly contradicts his affidavit, and there was no explanation presented for these contradictions. Accordingly, Gilreath's affidavit did not create a question of fact as to whether Adler was comparatively negligent due to speeding or driving unlawfully.

Given that there was no evidence presented by the nonmoving party as to Adler's negligence in operating his motor vehicle, and given that Adler and the Trustees presented the affidavit of their expert witness, Daniel Aerni, who stated that Adler was traveling under the posted speed limit and was not the cause of the accident, we cannot say that the trial court erred in determining that the Trustees were immune from liability, or in entering summary judgment in their favor. *See* R.C. 2744.02(A)(1) and (B)(1).

With respect to Adler's immunity, we note that Garrison and Schmidt conceded at oral argument before this court that Adler was immune from liability under R.C. Chapter 2744, because Garrison and Schmidt had not alleged or argued that Adler had operated his motor vehicle in a wanton or reckless manner. *See* R.C. 2744.03(A)(6)(b). Accordingly, we hold that summary judgment was properly entered in favor of Adler.

The single assignment of error is overruled, and the judgment of the trial court is affirmed.

A certified copy of this judgment entry constitutes the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HILDEBRANDT, P.J., CUNNINGHAM and DINKELACKER, JJ.

To the clerk:

Enter upon the journal of the court on May 17, 2013

per order of the court _____
Presiding Judge