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IN THE
COURT OF APPEALS OF INDIANA

STEPHEN M. PARK and SHIRLEY PARK,	)	
	)	
Appellants-Plaintiffs,	)	
	)	
vs.	)	No. 49A04-1011-CT-734
	)	
WILLIAM F. ECKHART,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Theodore M. Sosin, Judge
Cause No. 49D02-0811-CT-51542

May 16, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Stephen Park ("Park") and Shirley Park (collectively "the Parks") appeal the trial court's entry of summary judgment in favor of William Eckhart on the Parks' complaint alleging negligence. The Parks present a single issue for our review, namely, whether the trial court erred when it concluded that there are no genuine issues of material fact precluding summary judgment.

We reverse and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

On September 11, 2007, at approximately 2:00 p.m., Park, who was employed as a mounted patrol officer for the Indianapolis Metropolitan Police Department ("IMPD"), was riding his horse, Biscuit, westbound on Washington Street in downtown Indianapolis. Park and Biscuit were traveling in the fifth lane[1] of Washington Street, one lane south of the parking lane on the north side of Washington Street in front of the Indiana Repertory Theater building. Eckhart was driving his car northbound on Illinois Street when he made a left turn onto Washington Street, and Eckhart drove in the fourth lane, immediately south of Park and Biscuit. Also at that time and location, a box truck was parked in the north parking lane on Washington Street, immediately north of Park and Biscuit.

Park observed a man standing inside the box truck, and Park worried that Biscuit would be uncomfortable about his presence. In fact, it seemed to Park that when Biscuit saw the man in the truck, Biscuit took "a little step to the left" and the next thing Park

[1] According to the designated evidence, Washington Street has six lanes for travel and parking. Park and Biscuit were traveling in the fifth lane, with the parking lane to the north being the sixth lane.

remembers is "lying on top of a car looking up at [the] Embassy Suites[.]" Appellants' App. 33. In fact, Biscuit had reared up and thrown Park, who fell onto the windshield of Eckhart's car. Park sustained injuries as a result of the fall.

Anita Butts was a passenger on a bus stopped just east of Park and Biscuit on Washington Street, and Butts observed Biscuit "jump up, and [Park] fell off the horse, and the horse fell into [Eckhart's] car." Id. at 69. Butts did not see what had caused Biscuit to jump, and she did not see Eckhart's car enter the fifth lane or hit Biscuit before the horse jumped.

Officer Michael Smith, an evidence technician and accident investigator for the IMPD, arrived at the scene to investigate the accident. Officer Smith took photographs at the scene and spoke to Park and Eckhart. Park told Officer Smith that he had been riding Biscuit westbound on Washington Street when "all of a sudden the horse went left striking [Eckhart's] vehicle[.]" Id. at 86. And Eckhart told Officer Smith that "all of a sudden the horse . . . [moved] left like it was spooked, throwing [Park] onto his vehicle[.]" Id. Officer Smith concluded that Park and Biscuit had caused the accident.

The Parks filed a complaint against Eckhart alleging negligence in causing Park's injuries. Eckhart moved for summary judgment alleging that there was no genuine issue of material fact whether he had caused the accident. The Parks designated evidence in opposition to Eckhart's summary judgment motion and included the deposition testimony of Officer Smith. In that testimony, Officer Smith opined that in light of the photographic evidence, it appeared that Eckhart failed to yield the right of way while changing lanes and struck Biscuit, causing Park's injuries. Following a hearing on

Eckhart's motion, the trial court entered summary judgment in favor of Eckhart. This appeal ensued.[2]

DISCUSSION AND DECISION

We review a summary judgment order de novo. Bules v. Marshall County, 920 N.E.2d 247, 250 (Ind. 2010). The purpose of summary judgment is to end litigation about which there can be no factual dispute and which may be determined as a matter of law. Shelter Ins. Co. v. Woolems, 759 N.E.2d 1151, 1153 (Ind. Ct. App. 2001), trans. denied. We must determine whether the evidence that the parties designated to the trial court presents a genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law. Ind. Trial Rule 56(C); Bules, 920 N.E.2d at 250. We construe all factual inferences in the nonmoving party's favor and resolve all doubts as to the existence of a material issue against the moving party. Bules, 920 N.E.2d at 250. Summary judgment is a lethal weapon and courts must be mindful of its aims and targets and beware of overkill in its use. Heeb v. Smith, 613 N.E.2d 416, 420 (Ind. Ct. App. 1993), trans. denied.

To recover under a theory of negligence, a plaintiff must establish the following: (1) defendant's duty to conform his conduct to a standard of care arising from his relationship with the plaintiff, (2) a failure of the defendant to conform his conduct to that standard of care, and (3) an injury to the plaintiff proximately caused by the breach. Estate of Heck ex rel. Heck v. Stoffer, 786 N.E.2d 265, 268 (Ind. 2003). Summary

[2] The trial court entered summary judgment in favor of Eckhart in July 2010, but it is undisputed that the court did not send notice of that judgment to the parties. Accordingly, in October 2010, the trial court granted the Parks' Trial Rule 72(E) motion, filed without objection by Eckhart, for an extension of time to file their notice of appeal.

judgment is generally inappropriate in negligence cases because issues of contributory negligence, causation, and reasonable care are more appropriately left for the trier of fact. Estate of Mintz v. Connecticut General Life Ins. Co., 905 N.E.2d 994, 999 (Ind. 2009).

The Parks contend that the designated evidence supports a reasonable inference that Eckhart negligently operated his car and struck Biscuit, which proximately caused Park's injuries. During the deposition of Officer Smith, counsel for the Parks showed the officer photographs Officer Smith had taken at the scene following the accident. Those photographs showed scuff marks from Biscuit's shoes and Biscuit's blood only in the fifth lane. There was no photographic evidence demonstrating that Biscuit had entered the fourth lane prior to the accident. And the Parks direct us to the following excerpt from Officer Smith's deposition testimony:

> Q: Now, in light of the photographic evidence that has been demonstrated here in Plaintiffs' Exhibits 1 through 9, does it appear to you now, after a close examination of that photographic evidence, that the contact between the horse and the vehicle occurred in the fifth lane from the south curb on Washington Street?
>
> A: Yes.
>
> Q: If that were the case, would you then make a different determination as to primary cause?
>
> A: Yes.
>
> Q: And what would that determination be?
>
> A: Failure [of Eckhart] to yield right-of-way while changing lanes.

Appellants' App. at 89. In other words, in his deposition, Officer Smith expressed an opinion different from that stated in his original report and testified that Eckhart had caused the accident that resulted in Park's injuries. And the Parks contend that that

evidence establishes a genuine issue of material fact precluding summary judgment in favor of Eckhart.

Eckhart responds that given the lack of eyewitness testimony that Eckhart left the fourth lane at any time prior to the accident, there is no genuine issue of material fact and summary judgment was appropriate. Eckhart maintains that Officer Smith's opinion that Eckhart caused the accident is nothing more than mere speculation or conjecture, which will not support a reasonable inference of negligence. See Hayden v. Paragon Steakhouse, 731 N.E.2d 456, 458 (Ind. Ct. App. 2000). And Eckhart contends that Park's own statement following the accident, that Biscuit suddenly moved left and struck Eckhart's car, supports the entry of summary judgment.

But Officer Smith is a certified accident reconstructionist with several years' experience investigating accidents as a law enforcement officer. Officer Smith testified that he has investigated approximately 15,000 motor vehicle accidents since 2001. The Parks designated Officer Smith's deposition testimony as evidence in opposition to summary judgment, and Officer Smith opined that Eckhart caused the accident. That testimony is based on Officer Smith's experience in accident reconstruction, not mere speculation or conjecture. Again, on appeal from the grant of summary judgment, we construe all factual inferences in the nonmoving party's favor and resolve all doubts as to the existence of a material issue against the moving party. Bules, 920 N.E.2d at 250. We hold that the designated evidence establishes conflicting testimony and a genuine issue of material fact on the question of causation precluding summary judgment. A factfinder

may well enter judgment for Eckhart following a trial, but Eckhart is not entitled to summary judgment.

Reversed and remanded for further proceedings.

ROBB, C.J., and CRONE, J., concur.