RENDERED: MAY 3, 2002; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000990-MR

BRANDON MARKSBERRY, BY AND THROUGH
HIS NATURAL MOTHER AND NEXT FRIEND;
MECHELLE MARKSBERRY; AND
MECHELLE MARKSBERRY, INDIVIDUALLY — APPELLANTS

v.

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE DOUGLAS M. STEPHENS, SPECIAL JUDGE
ACTION NOS. 89-CI-00860 & 90-CI-00332

THE ROPER CORP., A SUBSIDIARY
OF GENERAL ELECTRIC CO., INC.;
GENERAL ELECTRIC CO., INC.;
AND SEARS, ROEBUCK & CO. — APPELLEES

OPINION
REVERSING AND REMANDING
** ** ** ** **

BEFORE: BARBER, GUIDUGLI, AND TACKETT, JUDGES.

BARBER, JUDGE: This appeal is from a summary judgment in favor of the defendants in a proceeding to enforce a settlement agreement. The trial court concluded that there was no agreement between the parties. For the reasons set forth below, we reverse and remand.

The underlying case was a products liability suit (riding lawnmower accident) brought by the Appellants, Brandon Marksberry, by and through his natural mother and next friend, Mechelle Marksberry, and Mechelle Marksberry, individually ("the

Marksberrys"), against the Appellees, The Roper Corp., a subsidiary of General Electric Co., Inc., General Electric Co., Inc., and Sears, Robebuck & Co. ("the Appellees"). The matter proceeded to a jury trial in 1998. The Marksberrys' claim that, at the close of proof, the Appellees offered to settle the case for $500,000.00, that the offer was accepted prior to the jury's verdict being published, and that an enforceable settlement agreement exists between the parties. At trial, the Marksberrys were represented by attorneys Richard Lawrence and Marcus Carey. Appellees were represented by attorneys Harry D. Rankin and Mark Hayden. The trial order, verdict, and judgment entered September 23, 1998, reflects the following:

> The jury began their [sic] deliberations in the case at approximately 1:30 p.m., and then at approximately 4:15 p.m. announced that they had reached a verdict. The court reconvened and before the verdict of the jury was published, the following discussion between the respective counsel for the plaintiff and defendants, and the court occurred:
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> MR. CAREY: Prior to the announcement of the jury verdict, the Defendants have made an offer to the Plaintiffs, which remained open, it had not been withdrawn. The Plaintiffs accepted the Defendants' offer, and we want the record to reflect that the Defendants have now indicated that the offer is no longer any good. It had never been withdrawn, I think they will acknowledge that.
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> MR. HAYDEN: What happened, Your Honor, is that a five hundred thousand dollar offer was made. They came back to us after the question came out from the

jury, and asked us whether or not we would hold that offer open for another ten minutes. We were on the phone with our people asking them that question, we hadn't got an answer back, and then the word came down that we had a verdict. My suggestions is, we take the verdict and then we discuss it some more, maybe brief the issue. I think that is all we can do.

JUDGE BAMBERGER: I'm going to take the verdict.

MR. CAREY: I understand, Judge, but for the record, I wanted to make sure the Defendants were prepared to admit that they had not yet withdrawn their offer at the time it was accepted.

MR. HAYDEN: Right, I just explained the circumstances. We made an offer, we made it about an hour ago.

JUDGE BAMBERGER: That's not an admission. That's not an admission of anything.

MR. HAYDEN: I've explained the circumstances.

MR. CAREY: I'm just trying to make whatever record we can.

JUDGE BAMBERGER: Oh, yeah, and I'm not taking issue with that.

MR. CAREY: I understand. Okay.

JUDGE BAMBERGER: I don't want to put words in their mouths.

MR. CAREY: Right. I think we understand that they're taking the position that it is not accepted.

MR. HAYDEN: We're not taking any position on this issue right now, Your Honor, I'm just explaining to you the situation.

MR. CAREY: Okay.

MR. HAYDEN: We think you ought to take the verdict and then we'll discuss it later.

The court then reviewed and published the jury's verdict, which was in favor of the Appellees. The trial court's order entered April 1, 1999, outlines subsequent procedural events which are relevant to the issue on appeal.

> This matter proceeded to trial by jury on August 17, 1999 and concluded August 28, 1999 when the jury announced that they had reached a verdict.
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> Prior to accepting the verdict, the exchange [as outlined above] took place between the attorneys and the court that is detailed in the Trial Order and Judgment.
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> Subsequent to the Trial Order and Judgment being entered, Plaintiffs moved the court to resolve the issue as to whether a settlement between the parties had occurred prior to accepting the jury verdict. The Defendants argue that the court has no authority to make such a determination.
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> This court was of the opinion that whatever it could do just prior to receiving the verdict it could do later. This court was also of the opinion that the attorneys were in agreement that the matter would be addressed at a later date. In fact, Mr. Hayden's last statement was "(W)e think that you ought to take the verdict and then we'll discuss it further." Even absent such an agreement this court finds that it does have the authority to determine whether there had been a settlement between the parties prior to the verdict being accepted [Citations omitted.]
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> . . . .

> **THEREFORE, IT IS HEREBY ORDERED** that the court will conduct a hearing, and pursuant to CR 39.03, use an advisory jury, should the court determine that an advisory jury is appropriate, to determine whether or not in fact a settlement had been reached between the parties before the jury verdict was accepted. (Emphasis original.)

By order entered June 9, 1999, a special judge was designated to preside in the matter. By order entered December 22, 1999, it was stipulated and agreed by the parties, and ordered, *inter alia*, that the dispute respecting an alleged agreed settlement shall proceed to be adjudicated on the merits; further, that the Marksberrys may proceed to prosecute the claims set out in their amended complaint and pursuant to the court's prior orders. In their amended complaint, the Marksberrys sought to enforce the settlement agreement, and alleged breach of contract, as well as common law bad faith for the Appellees' failure to comply with the terms of the contract without reasonable basis in law or fact, and violation of the Consumer Protection Act.

The Appellees filed a motion for summary judgment, arguing that there was no settlement agreement, as a matter of law. The trial court agreed and entered judgment in their favor, dismissing the amended complaint with prejudice. On appeal, the Marksberrys contend that the judgment must be reversed because the evidence establishes the existence of a binding contract, or at least, creates a genuine issue of material fact for the jury. The Appellees contend that the trial court did not err, because

the Marksberrys had rejected the offer and the undisputed evidence showed there was no meeting of the minds.

We review summary judgment de novo. The standard of review on appeal is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure (CR) 56.03. There is no requirement that we defer to the trial court since factual findings are not at issue. Goldsmith v. Allied Building Components, Inc., Ky., 833 S.W.2d 378, 381 (1992). "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991). Summary judgment is only proper where the moving party shows that the adverse party could not prevail under any circumstances. Id.

The Marksberrys contend that the trial court essentially resolved the disputed facts in favor of the Appellees and decided inferences from undisputed facts in favor of the Appellees. We agree. The trial court's reasons for granting the motion for summary judgment were incorporated by reference into the order. The videotaped transcript reflects, in pertinent part, that:

> There's two ways to look at this case. Let me start by saying, when we had the first conference on this case, I suggested to you that I was antagonistic towards these kinds of negotiations, when the jury is walking out of the jury room, but I promised you that, not withstanding, my feelings about abrogating what we entrust [to] the juries, I

would look at this with an open mind, and I have endeavored to do that . . . . We can look at this case in two ways. We can flyspeck this. We can miniaturize each little interaction, each little discussion, each little conversation, each little aspect of this case, or we can look at the whole picture . . . .

. . . .

The best that could be said in the plaintiffs' view, the best that could be said in support of the plaintiffs relative to the defendants' position in that regarding contract or not contract was that they were equivocal. I mean that was the best that you could say about Hayden's response to Marc Carey's solicitation. That he was equivocal, and we don't base contractual relations upon equivocal positions. Is this a soured relationship created by the defendants, no. It's a soured relationship created by the jury's verdict, which everybody recognized was going to be zero. It's a soured relationship created by the plaintiffs who saw this case which was worth a million or a million and half two, three, or four minutes ago, and is now worth nothing. I am not at all convinced looking at the big picture that this is a contractual relationship as we know it and understand it under the law of the Commonwealth. If we flyspeck this a little more closely, when Mr. Hayden offered $500,000 and Mr. Lawrence said, well how about a million or a million and a half structured, and he talks to his client and his client says, no, that's a refusal. That has to be a refusal. That's a denial. It's an equivocal denial by Mr. Lawrence, but an unequivocal denial by the client . . . . The client, I think we all acknowledge, that the client under the laws of the Commonwealth determines whether there is a contract or not.

. . . .

So I'm not too sure there was even an offer, a contractual foundation at the very beginning stages of this and I suspect, although obviously I can't say with any certainty, but I suspect that's what in Mr. Hayden's mind when he is telling the Judge,

> Judge these things are happening, this happens, all of this has occurred in five minutes, let's take the verdict. Let's sort out of the mess later on. Here we are doing that. So, I just don't see this as a contract. It's evident in the activities of Mr. Carey that he wasn't even sure there was a contract. It was obvious in Mr. Lawrence's dealings with this that he wasn't sure that it was a contract, or it was a contract that could be entered into or resurrected because everybody is saying, hey, is it still there, is it still there. That certainly doesn't demonstrate any sense of expectation or reliance upon a fixed position. Here's the $500,000 and it's there forever. I just don't see it as a contract. Again, to step back and look at the big picture, I'm not sure it's appropriate that we impose upon parties contractual relations under these kinds of circumstances. I think it's bad public policy.
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> . . . .
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> I think a summary judgment is appropriate. You can argue well where's the harm in letting an advisory jury set the facts, but I'm not too sure that this picture is one that needs the jury's view. I think that for all of these reasons, I've said that summary judgment should be granted for the defendants dismissing the complaint . . . .

"State of mind issues such as intent and expectation are generally inappropriate for determination at the summary judgment stage because their resolution depends on weighing all the evidence and drawing permissible but not required inferences." James Graham Brown Foundation, Inc. v. St. Paul Fire & Marine, Ky., 814 S.W.2d 273, 281 (1991). Even where the basic facts are not in dispute, summary judgment is inappropriate where the parties in good faith disagree upon the inferences to be drawn from such facts. Pessin v. Keeneland Assn., 45 F.K.D. 10 (D.C. Ky. 1968). "If a dispute exists as to whether an oral

agreement was reached, the issue is to be resolved by a jury. [Citation omitted.]" Motorists Mutual Ins. Co. v. Glass, Ky., 996 S.W.2d 437, 445 (1999). CR 56 does not authorize the adjudication of factual issues; it only authorizes the court "by a pretrial sifting to penetrate the allegations of fact" and discover whether there is an issue of fact to be tried. Rowland v. Miller's Adm'r., Ky., 307 S.W.2d 3,5 (1956).

We conclude from our review of the record that there were genuine issues of fact to be tried. Mark Modlin's testimony established that after Mr. Lawrence asked about more money by way of a structured settlement, Mark Hayden made a call. Mr. Hayden then said "$500,000 is all we have, we are not going to be able to get anymore, that's it." Mr. Lawrence's testimony established that he did not reject the $500,000, by asking if Appellees could pay more; further, that the $500,000 was "re-offered."

Appellees' characterization of Mechelle Marksberry's having unequivocally rejected the $500,000, as too low, demonstrates a disturbing lack of candor to this court. We fully agree with the Marksberrys that Mechelle's private and privileged communications with her counsel are irrelevant, because they were not relayed to defense counsel.[1]

Mr. Carey testified he told Mr. Hayden, "we accept the offer." Mr. Hayden responded he did not know whether they had a settlement or not. Mr. Carey said "wait a minute you made us an offer. It was never withdrawn, was it? He said no. I said then

[1] The trial court acknowledged that Mechelle Marksberry's "refusal" was never communicated to Mr. Hayden, but considered it nonetheless.

we accept." Mr. Hayden said he didn't know, that they would have to talk about it. Clearly, there was a dispute as to whether an oral agreement was reached.

The trial court appears to have improperly evaluated the evidence and determined that there was no contract. Sufficient issues of material fact — and inferences to be drawn from the facts — exist that it was error to grant the motion for summary judgment.

Appellees contend that the Marksberrys did not address their ex delicto claims and their claim arising under the Kentucky Consumer Protection Act on appeal; thus, Appellees argue that entry of summary judgment on those claims cannot be reversed. The Marksberrys did address their claim for punitive damages arising out of an alleged breach of contract accompanied by wrongful conduct; they appear to have abandoned only their claim under the Consumer Protection Act.

The trial court did not "see" any deceit or duplicity or any tortious conduct on Mr. Hayden's part. The trial court again appears to have evaluated the evidence, instead of determining if there were any genuine issues of material fact. The trial court also appears to have considered Mr. Hayden's state of mind, an issue inappropriate for summary judgment where inferences must be drawn.

Thus, we reverse the order and judgment of the Boone Circuit Court and remand this case for further proceedings consistent with this Opinion.

ALL CONCUR.

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