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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000600-MR

ERNEST ABNEY

APPELLANT

v. APPEAL FROM BOURBON CIRCUIT COURT
HONORABLE ROBERT G. JOHNSON, JUDGE
ACTION NO. 08-CI-00087

KENTUCKY FARM BUREAU
MUTUAL INSURANCE COMPANY
AND JOHN SMOOT

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON AND STUMBO, JUDGES; KNOPF,¹ SENIOR JUDGE.

STUMBO, JUDGE: Ernest Abney appeals from an order of the Bourbon Circuit

Court granting summary judgment in favor of Kentucky Farm Bureau Mutual

¹ Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Insurance Company (hereinafter KFB) and John Smoot, a KFB claims adjuster. Abney filed suit against KFB and Smoot based on the events that transpired following an October 1, 1999, motor vehicle accident. Abney asserted claims for fraudulent misrepresentation, negligent misrepresentation, negligent training, and negligent supervision. The trial court held that there was no evidence in the record that Smoot or KFB made a misrepresentation to Abney and granted summary judgment. We find the court correctly granted summary judgment and affirm.

On October 1, 1999, Abney was the passenger of a truck driven by Arthur Brake. The truck rear-ended a car being driven by Tonya Wright. Wright had stopped suddenly, causing the accident. Brake was insured by Nationwide Mutual Insurance Company and Wright was insured by KFB.

Following the accident, Abney made a claim for damages against Wright and KFB. Smoot was assigned to adjust the claim. KFB and Smoot believed Brake was partly at fault and would not pay the full amount Abney was seeking. During the negotiations seeking a settlement, Smoot informed Abney that he could file a claim against Brake, individually, and his insurer Nationwide. This statement is uncontroverted. A settlement was reached and Abney was given a lump sum payment. Abney was required to sign a release in favor of KFB and Wright in order to get the lump sum payment. The release discharged all of Abney's claims against KFB and Wright. In his complaint, Abney claims Smoot advised him that a release would not prohibit a claim against Brake and

Nationwide. Smoot claimed he never said anything regarding the release as it pertains to a future claim against Brake.

Abney then brought suit in Bourbon Circuit Court against Brake and Nationwide. Brake and Nationwide moved for summary judgment alleging that the release Abney signed was a general release and released all claims against all parties involved in the accident. They pointed to language in the release that stated it was to release

all other persons, firms or corporations liable, or who might be claimed to be liable, of and from any and all actions, causes of action, claims, demands, costs, loss of services, expenses and compensation, or suits at law or in equity, of whatsoever kind or nature, arising out of any and all known and unknown injuries and damages resulting or to result from an accident that occurred on or about the 2 day of October, 1999 at or near Bethlehem Road Bourbon County Kentucky.

Abney v. Nationwide Mut. Ins. Co., 215 S.W.3d 699, 702 (Ky. 2006).

The circuit court granted summary judgment. Abney appealed and a previous panel of this Court affirmed. The Kentucky Supreme Court granted review and held that the release was unambiguous and therefore it would be enforced as written.

Abney then filed suit against KFB and Smoot alleging that they misrepresented the effect of the release to him in order to obtain his signature. Abney claims that Smoot knew or should have known that the release would release all parties, not just KFB and Wright. KFB and Smoot moved for summary judgment claiming there was no evidence Smoot ever made a misrepresentation

regarding the effect of the release. The trial court granted the motion and this appeal followed.

The standard of review on appeal of a summary judgment 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
“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 movant shows that the adverse party could not prevail under any circumstances.” *Steelvest*, 807 S.W.2d at 480, citing *Paintsville Hospital Co. v. Rose*, Ky., 683 S.W.2d 255 (1985). Consequently, summary judgment must be granted “[o]nly when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor” *Huddleston v. Hughes*, Ky. App., 843 S.W.2d 901, 903 (1992).

Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky. App. 1996).

In order to maintain an action for fraudulent misrepresentation, one must “establish six elements of fraud by clear and convincing evidence as follows:
a) material representation b) which is false c) known to be false or made recklessly
d) made with inducement to be acted upon e) acted in reliance thereon and f)
causing injury.” *United Parcel Service Co. v. Rickert*, 996 S.W.2d 464, 468 (Ky. 1999).

As for negligent misrepresentation,

[o]ne who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is

subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Presnell Const. Managers, Inc. v. EH Const., LLC, 134 S.W.3d 575, 580 (Ky. 2004).

Abney argues that the trial court erred in finding there was no evidence that Smoot made a false representation to him. He points to his affidavit, the affidavit of his wife, and Smoot's deposition testimony. He claims that there is evidence that the release was only intended to release KFB and Wright, not Brake and Nationwide. Also, in Smoot's deposition, he admits that he told Abney that he might have a claim against Brake, but that the statement was not made contemporaneously with the execution of the release. Smoot also admitted that the release was intended only to discharge the claims against KFB and Wright.

Smoot and KFB argue that even if Smoot said Abney would have a claim against Brake, it was not a false statement. Abney did have a claim against Brake before he signed the release. Further, KFB and Smoot argue that Smoot never stated the release would not preclude a suit against Brake.

Abney brings our attention to the case of *Johnson v. Cormney*, 596 S.W.2d 23 (Ky. App. 1979)(overruled on other grounds), for the proposition that direct evidence of fraud is not necessary, but that fraud may be established by circumstantial evidence. Although not clear, it appears as though Abney is arguing

that even if Smoot did not say the release would not affect any claims brought against Brake and Nationwide, it can be inferred from other evidence.

We must affirm the trial court's order for summary judgment. Even if we were to assume Smoot said the release would not discharge Abney's claims against Brake and Nationwide, there is no evidence that this statement was known to be false or that it was unreasonable for Smoot to think that statement was false. At all times, Smoot has stated he did not know the release would also discharge the claims against Brake and Nationwide. We note that when the Kentucky Supreme Court considered Abney's first appeal in *Abney v. Nationwide Mut. Ins. Co.*, *supra*, the Court clearly stated that the case involved an issue of first impression, namely, "does a release negotiated with one joint tortfeasor discharging 'all other persons, firms or corporations liable, or who might be claimed to be liable' effectively release another joint tortfeasor who had not negotiated or paid any consideration for the release?" *Abney* at 701. Looking at the case in a light most favorable to Abney, it appears that he could not produce any evidence at trial to show that Smoot knew, or should have known, that the release would also discharge any claims against Brake and Nationwide.

For the foregoing reasons, we affirm the Order granting summary judgment in favor of KFB and Smoot.

KNOPF, SENIOR JUDGE, CONCURS.

CAPERSON, JUDGE, DISSENTS, AND FILES SEPARATE

OPINION.

CAPERTON, JUDGE, DISSENTING: The question presented to our Court is whether the Abneys have sufficient evidence to survive summary judgment on their claim of fraud. The allegation of fraud was supported by the affidavits of Ernest Abney, Christine Abney, and John Smoot. The Abneys say that Smoot advised them that at the time of the signing of the release, the release would not affect their claim against KFB. Smoot's testimony is equivocal and when all affidavits are viewed in a light most favorable to the Abneys, I believe that the evidence is sufficient to withstand the motion for summary judgment.

While this matter was heard by our Supreme Court on prior appeal, the issue of fraud was neither considered nor decided. In *Abney v. Nationwide Mut. Ins. Co.*, 215 S.W.3d 699, 704, n.1 (Ky. 2006) our Supreme Court stated "Our review of the record reveals that Abney consistently argued below that the release at issue should be reformed due to a mutual mistake on the part of Smoot and Abney. Abney never argued fraud, undue influence or abuse of confidence on the part of Smoot. Consequently, that issue was not before the trial court, and this Court will not consider any argument based on that premise."

I would reverse and remand for further proceedings.

BRIEFS AND ORAL ARGUMENT
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BRIEF FOR APPELLEES:

Guy R. Colson
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ORAL ARGUMENT FOR
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