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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000532-MR

LEE ROY HARRELL — APPELLANT

v. — APPEAL FROM KNOX CIRCUIT COURT
HONORABLE GREGORY A. LAY, JUDGE
ACTION NOS. 02-CI-00604 & 03-CI-00341

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY — APPELLEE

AND NO. 2009-CA-000819-MR

ANNA HARRELL; AND
LOUISE HARRELL — APPELLANTS

v. — APPEAL FROM KNOX CIRCUIT COURT
HONORABLE GREGORY A. LAY, JUDGE
ACTION NO. 02-CI-00604

LEE ROY HARRELL; AND
STATE FARM MUTUAL AUTOMOBILE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON AND KELLER, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

KELLER, JUDGE: Lee Roy Harrell (Lee Roy) appeals from a Judgment of the Knox Circuit Court based upon a jury verdict in favor of State Farm Mutual Automobile Insurance Company (State Farm). Consolidated with that appeal is Louise's Harrell (Louise) and Anna Harrell's (Anna) appeal from an Order Granting Partial Summary Judgment in favor of Lee Roy. For the reasons set forth below, we affirm.

FACTS

Both cases on appeal arise from an automobile accident which occurred on September 6, 2000, at the intersection of Ohler Road and U.S. 25E in Corbin, Knox County, Kentucky, which is controlled by traffic lights. Lee Roy was traveling in his vehicle on Ohler Road toward the U.S. 25E intersection. Lee Roy's wife, Louise, and his sister-in-law, Anna, were passengers in the vehicle. At the same time, Aden Clark (Clark) was driving a vehicle owned by his passenger, Gary Fields (Fields). Clark and Fields were headed to work and were traveling

[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

west on U.S. 25E. A third vehicle driven by Russell Lawson (Lawson) was traveling east on U.S. 25E.

When the collision occurred, the vehicle driven by Clark struck the Harrell vehicle on the driver's side door. After the impact, the Harrell vehicle proceeded forward striking the vehicle driven by Lawson and overturning it. The Harrell vehicle continued forward striking a parked vehicle in the adjacent Pickard Chrysler parking lot and knocked that vehicle into another vehicle before coming to rest.

Initially, in Civil Action No. 02-CI-00604, Lee Roy filed suit against Clark for injuries and property damage that resulted from the accident. That action was later consolidated with Civil Action No. 03-CI-00341, wherein Louise and Anna filed suit against Lee Roy and Clark claiming that each had negligently operated their vehicles resulting in injury to Louise and Anna. In that same suit, Louise and Anna filed a claim against State Farm pursuant to their automobile insurance policy providing underinsured motorist coverage. Civil Action No. 02-CI-00604 and Civil Action No. 03-CI-00341 were consolidated.

Prior to trial, Anna's and Louise's claims against Lee Roy were dismissed by an Order Granting Partial Summary Judgment entered by the Knox Circuit Court on May 19, 2006. Additionally, Louise, Anna, and Lee Roy all settled with Clark. Lee Roy filed a cross-claim against State Farm, his underinsured motorist coverage carrier, to recover damages sustained in the

accident which exceeded the damages recovered from Clark. Thus, at trial, the only defendant remaining was State Farm.

At trial, there was conflicting testimony presented with respect to who caused the accident. All three Harrells testified that Lee Roy had the green light when he entered the Ohler Road and U.S. 25E intersection. However, Clark and Fields testified that Clark had the green light when Clark entered the intersection.

After a four-day trial, the jury found Lee Roy to be 100% at fault. Accordingly, the Harrells' claims against State Farm were dismissed. These appeals followed.

STANDARDS OF REVIEW

The issues raised by the Appellants have different standards of review. Therefore, we will set forth the appropriate standard of review as we address each issue.

ANALYSIS

1. Jury Verdict

On appeal, Lee Roy argues that the verdict returned by the jury was contrary to the evidence and the instructions given by the trial court. In *Lewis v. Bledsoe Surface Mining Co*., 798 S.W.2d 459 (Ky. 1990), the Supreme Court of Kentucky set forth the standard to be applied when reviewing a jury verdict:

> Upon review of the evidence supporting a judgment entered upon a jury verdict, the role of an appellate court is limited to determining whether the trial court erred in failing to grant the motion for directed verdict. All evidence which favors the prevailing party must be taken

> as true and the reviewing court is not at liberty to determine credibility or the weight which should be given to the evidence, these being functions reserved to the trier of fact. The prevailing party is entitled to all reasonable inferences which may be drawn from the evidence. Upon completion of such an evidentiary review, the appellate court must determine whether the verdict rendered is "'palpably or flagrantly' against the evidence so as 'to indicate that it was reached as a result of passion or prejudice.'"

Id. at 461-62 (citations omitted).

In support of his argument, Lee Roy cites to *Swartz v. Humphrey*, 437 S.W.2d 750 (1969), wherein two vehicles collided at a controlled intersection. In *Swartz*, the former Kentucky Court of Appeals addressed whether it was appropriate to limit jury instructions to the narrow issue of which driver had the traffic light in his favor. In addressing this issue, the Court noted that a green light does not afford a driver

> carte blanche assurance that he [can] go through the intersection without regard to the prevailing traffic conditions in it. 'A green light or 'go' signal, is not a command to go regardless of other persons or vehicles that may already be at the intersection[,] but is a qualified permission to proceed carefully in the direction indicated.'

Id. at 753 (internal citations omitted). Thus, the Court concluded that when the evidence supports an inference that both vehicles entered the intersection properly, or that one or both of the drivers thereafter could have avoided the collision by the exercise of ordinary care, the instructions should not be limited to the issue of which one violated the red light. *Id.*

Lee Roy concedes that the jury was properly instructed pursuant to *Swartz*. However, Lee Roy argues that, based on *Swartz*, even if Clark had a green light, Clark breached his duty to proceed cautiously and avoid the collision with the Harrells' vehicle. Specifically, Lee Roy contends that because Clark's vehicle struck his vehicle, he was in the intersection before Clark. Thus, Lee Roy argues that the jury either failed to follow the instructions given on that point or decided that point against the weight of the evidence. We disagree.

Instruction No. 2 provided the following:

> It was the duty of the plaintiff, Lee Roy Harrell, to exercise ordinary care for his own safety and for the safety of other persons using the highway, and this general duty included the following specific duties:
>
> (a) to keep a lookout ahead for other vehicles in front of him or so near his intended line of travel as to be in danger of collision;
>
> (b) to have his automobile under reasonable control;
>
> (c) to drive at a speed no greater than was reasonable and prudent, having regard for the traffic and for the condition and use of the highway;
>
> (d) to exercise ordinary care generally to avoid collision with other persons or vehicles using the highway;
>
> AND
>
> (e) not to enter the intersection of US 25 E and Ohler Road against the red traffic light;
>
> (f) it was further the duty of Lee Roy Harrell upon entering the intersection to exercise ordinary care to observe the presence and avoid collision with any other

> conflicting traffic which may already have entered the intersection but had not yet cleared through it.

Instruction No. 3 provided an identical instruction regarding Aden Clark's duty of care. In Question No. 1, the jury was asked whether Lee Roy had breached any duty contained in the instructions which was a substantial factor in causing the accident. To that interrogatory, the jury answered "yes". In Question No. 2, the jury was asked whether Clark breached any duty contained in the instructions which was a substantial factor in causing the accident. To that interrogatory, the jury answered "no".

Certainly, there was evidence to support each party's position. Both parties testified that they had a green light and that they did not see the other's car when they entered the intersection. All three Harrells testified that they were stopped briefly behind a blue car at a traffic light at the Ohler Road and U.S. 25E intersection. When the light turned green, they proceeded slowly out into the intersection behind the blue car. They came almost to a stop as the blue car in front of them gave a left turn signal. It was at this point that Clark struck the Harrell vehicle.

Clark and Fields both testified that as they approached the Ohler Road and U.S. 25E intersection, Clark's traffic light, which was red, changed to green. Both Fields and Clark testified that as they entered the intersection, the Harrell vehicle shot in front of them and that the accident happened instantly.

Although there was evidence to support each party's position, when looking at the evidence as a whole, and in the light most favorable to State Farm, we believe the jury could reasonably have found that Lee Roy breached his duty to exercise ordinary care when he entered the intersection and that Clark did not. *Gorman v. Hunt*, 19 S.W.3d 662, 671 (Ky. 2000) (*citing Lewis*, 798 S.W.2d at 461)). Thus, we simply cannot conclude that the jury's verdict was palpably and flagrantly against the weight of the evidence so as to be the result of passion or prejudice. *Lewis*, 798 S.W.2d at 462.

2. Summary Judgment

Louise and Anna argue the trial court erred in granting partial summary judgment in favor of Lee Roy because their testimony did not rise to the level of judicial admissions. We disagree.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Kentucky Rules of Civil Procedure (CR) 56.03. Summary judgment is properly granted "where the movant shows that the adverse party cannot prevail under any circumstances." *Steelvest, Inc. v. Scansteel Serv. Ctr. Inc.,* 807 S.W.2d 476, 479 (Ky. 1991). When considering a motion for summary judgment, the trial court must view the record "in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Id.* at 480.

An appellate court need not defer to the trial court's decision on summary judgment and will review the issue *de novo* because only legal questions and no factual findings are involved. *See Barnette v. Hosp. of Louisa, Inc*., 64 S.W.3d 828, 829 (Ky. App. 2002).

Establishing the propriety of the trial court's grant of summary judgment in favor of Lee Roy requires a multi-step analysis. First, we must determine as a matter of law whether Louise and Anna's deposition testimonies included judicial admissions. Second, if Louise and Anna made judicial admissions, we look to whether the trial court properly decided that there were no genuine issues of material fact and Lee Roy was entitled to judgment as a matter of law.

As set forth in *Witten v. Pack*, 237 S.W.3d 133, 136 (Ky. 2007):

> "A judicial admission . . . is a formal act of a party (committed during the course of a judicial proceeding) that has the effect of removing a fact or issue from the field of dispute; it is conclusive against the party and may be the underlying basis for a summary judgment, directed verdict, or judgment notwithstanding the verdict." Robert G. Lawson, *The Kentucky Evidence Law Handbook* § 8.15[4], at 590 (4th ed. LexisNexis 2003) (emphasis omitted). Testimony of a party may constitute a judicial admission if "deliberate and unequivocal and unexplained or uncontradicted." *Bell v. Harmon*, 284 S.W.2d 812, 815 (Ky. 1955). However, judicial admissions should be "narrowly construed." *Lewis v. Kenady*, 894 S.W.2d 619, 622 (Ky. 1994). Whether a statement is a judicial admission is a question of law that we review *de novo*. *Reece v. Dixie Warehouse and Cartage Co.*, 188 S.W.3d 440, 448 (Ky. App. 2006).

Louise and Anna first argue that the trial court erred in determining that their deposition statements were judicial admissions because their statements were not deliberate, clear, and unambiguous waivers of liability absolving Lee Roy of negligence. We disagree.

In her deposition, Louise testified to the following regarding the accident:

> Q: There was an accident, was there not?
>
> A: Yes
>
> Q: Can you tell me what happened?
>
> A: Yes . . . . We were going up the road, whatever the clip is you go there, and we stopped at the red light at the Sonic. There was one car in front of us . . . .
>
> . . . .
>
> A: So anyway, we pulled out, so I looked ahead naturally, and the light was green, and the car in front of us had her turn signal on, it was a lady and it was a dark blue car, to turn left. . . . So he slowed down, and about that time, wham, this car comes out of nowhere. I didn't see it. The only thing I saw was my husband go this way and just fall, you know.
>
> . . . .
>
> A: [A]nd then the policeman got there, and he asked me if I'd seen the driver of that other car, and I said no. And he asked me if I knew what happened, and I probably said no, I don't recall what I told him, I don't, I don't really recall what I told him. I'd have probably told him anything to get him out of my face because I was so worried about Lee Roy. . . .

In her deposition, Anna testified to the following regarding the accident:

> Q: And what do you remember about the accident?
>
> A: We come [sic] up the Ohler Road after we left Lee Roy's, which is about three-quarters of a mile, and we stopped at the light. There was a – the best I can remember the car in front of us was blue, and I don't know if there was one behind us or not. The light was red, and we stopped and it turned green, and we was [sic] going maybe approximately ten miles an hour, or fifteen, I don't know how fast, and this car just came out of nowhere in the fast lane of traffic over there and hit us, and that's all I know.
>
> Q: Where did the car that was ahead of you go?
>
> A: It turned to the left towards Barbourville.
>
> Q: So it had cleared the intersection and you all were entering the intersection at the time?
>
> A: No, we were already in it.
>
> . . . .
>
> Q: Now, did Lee Roy attempt to stop the vehicle, his car, when he was struck, first struck?
>
> A: No, we didn't see the car coming.
>
> . . . .
>
> Q: And as you're approaching that light was it red the whole time you remember, or was it green and then turned red?
>
> A: I - - I don't remember when it turned red. I just know it was red when we got to it and we stopped.
>
> Q: Did you see the light?

A: Yes.

Q: Did you see the light turn green?

A: Yes.

Q: You didn't just assume it was green because he was . . .

A: No, I seen [sic] it turn green.

. . . .

Q: Ann[a], he asked you, you were coming up the road at the Sonic and stopped at a red light, is that true?

A: Yeah.

Q: And the light was red?

A: Yeah.

Q: There was a car in front of you?

A: Yeah.

Q: You don't know whether or not there was a car behind you?

A: Right.

Q: And Lee Roy was driving?

A: Yeah.

Q: And did you see the light change to green?

A: Yes.

Q: And when the light changed to green did the car in front of you guys pull off?

A: Yes.

Q: I mean pull out?

A: And it slowed to turn to the left and we had to slow behind it, you know, so it could go on, and about the time Lee Roy slowed some, wham.

Q: Alright, you'd already made it out in the road, in the middle of the road, when the car hit you?

A: Car hit us, yeah. Almost to the median, you know, and it just, wham.

Q: But you're saying that the vehicle that you were riding [in] had the green light to go?

A: Yes.

Q: And one car pulled out in front and had the green light to go?

A: Yes.

Q: Did you ever see the vehicle that hit you?

A: No, not until after it hit us.

Although Louise and Anna made the preceding statements, they contend that their testimonies were not conclusive and unequivocal waivers of Lee Roy's liability. In support of their argument, they point to Louise's deposition statements that she did not recall what she told the policeman when he arrived on the scene. They further note the following statement made by Louise in her deposition:

Q: You mentioned you talked to the police officer, and he wrote down that all passengers of unit 1 stated they thought the light was green but it all happened so fast that

they just remember the impact of the collision and nothing else. Do you remember saying that to him?

A: I don't remember what I told him.

Although Louise testified that she did not recall what she told the police officer at the scene of the accident, we believe that Louise and Anna's deposition testimonies were sufficiently deliberate, clear, and unequivocal statements about facts within their particular knowledge to qualify as judicial admissions. *See Wandling v. Wandling*, 357 S.W.2d 857 (Ky. 1962); *Bell v. Harmon*, 284 S.W.2d 812 (Ky. 1955). First, Louise and Anna testified that they were both passengers in the vehicle, and both explicitly stated that Lee Roy had a green light when he entered the intersection. Additionally, they both testified that there was a car in front of them when they entered the intersection. Anna further testified that they were going approximately ten to fifteen miles per hour when they entered the intersection. Anna also stated that Lee Roy slowed down when the car in front of them moved to the left turning lane. Finally, both Louise and Anna stated that they did not see the vehicle driven by Clark when they entered the intersection and that the vehicle driven by Clark hit their vehicle on the side.

A fair reading of their testimony can lead to no other conclusion than that Lee Roy acted properly and that it was Clark's negligence that caused the accident and injuries. Thus, we concluded that Louise and Anna deliberately and unequivocally stated facts clearly showing that the collision occurred without the fault of Lee Roy. *Bell*, 284 S.W.2d at 816.

Next, Louise and Anna contend that the trial court failed to consider the entirety of their deposition testimony and that their testimony did not eliminate each and every possible source of negligence that may be attributable to Lee Roy. Specifically, they argue that the trial court erred because it only addressed the issue of the traffic control light and did not take into consideration Lee Roy's breach of his duty to exercise ordinary care when entering the intersection. We disagree.

We first note that the trial court did take into consideration more than just the issue of the traffic control light. In its order, the trial court stated the following:

> Anna and Louise Harrell argue that their testimony does not eliminate each and every possible source of negligence that m[a]y be attributable to Lee Roy Harrell. The Court disagrees. Their testimony reveals a state of facts that, if true, completely exonerates Lee Roy Harrell from *any* imputation of negligence.

(Emphasis added). We believe that the trial court was correct. As noted above, Louise and Anna unequivocally stated facts showing clearly that the collision occurred without the fault of Lee Roy. Specifically, they testified that Lee Roy proceeded slowly into the intersection behind another car, that Clark's vehicle was not in the intersection when Lee Roy entered the intersection, and that they did not see Clark's vehicle until it hit them. By making these statements, Louise and Anna completely absolved Lee Roy of any negligence, so as to entitle him to judgment on the basis of a judicial admission. *See Wandling*, 357 S.W.2d at 858.

Finally, Louise and Anna contend that their testimony did not constitute a judicial admission because their testimony was contradicted by other witnesses. Specifically, Louise and Anna argue that the testimony of Clark and Fields that Clark had the green light, showed that Louise and Anna could have been mistaken as to the facts. In *Halbert v. Lange*, 233 S.W.2d 278, 280 (Ky. 1950), it was recognized that the conclusiveness of a judicial admission may be destroyed "if and when the party corrects his statements, explains them, or introduces other testimony showing that he could have been mistaken as to the facts." However, as explained in *Bell*, 284 S.W.2d at 815-16:

> [I]f he testifies positively and understandingly to the basic facts and circumstances in the case, and in the event his testimony would defeat his recovery, he makes no subsequent correction or modification under the claim of confusion or mistake, he may not have the benefit of the testimony of other witnesses which is contradictory of his own testimony with respect to the same matters. In other words, he cannot make out a better case for himself than he himself has testified to where his case involves facts within his own knowledge, for if this were to be allowed, it would be tantamount to permitting him to say for his own advantage that his own testimony should be regarded as false, and that of some other witness as true.

Because Louise and Anna testified positively to the basic facts in the case, they cannot use the testimony of Clark and Fields to make out a better case for themselves than what they testified to in their depositions. Thus, this argument must also fail.

Having concluded that Louise's and Anna's deposition statements constituted judicial admissions, we turn to the question of whether Lee Roy was

entitled to summary judgment. A judicial admission has a conclusive effect on the party who makes it that prevents that party from introducing further evidence to disprove or contradict the admitted fact. *Zipperle v. Welsh*, 352 S.W.2d 556 (Ky. 1962). In order to state a cause of action for negligence, a plaintiff must establish a duty on the part of the defendant, a breach of that duty, and a causal connection between the breach of the duty and the injury to the plaintiff. *Lewis v. B&R Corp*., 56 S.W.3d 432, 436-37 (Ky. App. 2001). The absence of any one of these three elements is fatal to a claim.

Louise's and Anna's statements that Lee Roy had the green light, proceeded at ten to fifteen miles per hour behind another vehicle when entering the intersection, and that they did not see Clark in the intersection prior to being hit by the vehicle Clark was driving, effectively negated any claim that Lee Roy breached his duty to handle his vehicle in a reasonable manner. Thus, there are no genuine issues of material fact and Lee Roy was entitled to judgment as a matter of law.

For the foregoing reasons, we affirm the Judgment of the Knox Circuit Court and its Order Granting Partial Summary Judgment.

ALL CONCUR.

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