RENDERED: APRIL 15, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000319-MR

LUTHER JOHNSON — APPELLANT

v.

APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE JOHN DAVID CAUDILL, JUDGE
ACTION NO. 07-CI-00829

WENDLE L. WILLIAMS AND
CHARTER COMMUNICATIONS, INC. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT, MOORE AND NICKELL, JUDGES.

NICKELL, JUDGE: Luther Johnson appeals from an order of the Floyd Circuit Court awarding summary judgment to Wendle Williams and Charter

Communications, Inc.[1] After reviewing the briefs, the record and the law, we affirm.

FACTS

The facts of this appeal are undisputed. On January 27, 2006, at about 4:35 p.m., Williams, driving an Interlink Communications Partners, LLC, utility truck, was entering KY 114 eastbound from Fitzpatrick Road. As he made a left turn, a ladder fell from the top of his truck into the westbound lane of KY 114 and blocked traffic. Williams stopped his truck in the eastbound lane of KY 114 and turned on his emergency flashers. He then quickly retrieved the ladder from the westbound lane and while waiting for traffic to clear so he could return to his truck, Elizabeth Lewis, driving east on KY 114, rear-ended his stopped vehicle.

More than thirty minutes later, Johnson was traveling east on KY 114 when he rear-ended a UPS truck that was stopped or nearly stopped in bumper-to-bumper traffic due to the Lewis/Williams collision. According to the police report, Johnson's inattention caused him to fail to notice the stopped traffic or the UPS truck. Damage to Johnson's truck was deemed severe and he suffered physical injuries.

Johnson filed a complaint alleging Williams was negligent in failing to secure the ladder to his truck and thereby caused Johnson's damages. Williams

[1] According to pleadings filed by Charter, its correct name is Interlink Communications Partners, LLC. , a correction partially reflected in the trial court's order entered on January 30, 2009. We note that the trial court referred to the party as Interlink Communications Partners, LLP.

and Interlink moved for summary judgment arguing Johnson could not establish they owed him a duty or that their conduct caused Johnson's accident. Johnson opposed the motion for summary judgment arguing Williams and Interlink owed a general duty to all drivers and they breached that duty when Williams stopped his truck in the westbound lane of KY 114 to retrieve the fallen ladder and thereby caused Johnson to rear-end the UPS truck.

The trial court found no genuine issue of material fact existed and that Williams and Interlink were entitled to judgment as a matter of law because they did not breach any duty owed to Johnson, nor was the Lewis/Johnson accident the proximate cause of Johnson's accident. Thereafter, the trial court granted summary judgment to Williams and Interlink. It is from this order that Johnson appeals and we affirm.

LEGAL ANALYSIS

> While it has been recognized that summary judgment is designed to expedite the disposition of cases and avoid unnecessary trials when no genuine issues of material fact are raised, *see, Dossett v. New York Mining and Manufacturing Co.*, Ky., 451 S.W.2d 843 (1970), this Court has also repeatedly admonished that the rule is to be cautiously applied. *See, Rowland v. Miller's Adm'r,* Ky. 307 S.W.2d 3 (1956). 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. *Dossett v. New York Mining and Manufacturing Co., supra*; *Rowland v. Miller's Adm'r, supra*. Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact. *Puckett v. Elsner*, Ky., 303 S.W.2d 250 (1957). The trial judge must examine the evidence, not

> to decide any issue of fact, but to discover if a real issue exists. It clearly is not the purpose of the summary judgment rule, as we have often declared, to cut litigants off from their right of trial if they have issues to try. *See, Bonded Elevator, Inc. v. First National Bank of Louisville*, Ky., 680 S.W.2d 124 (1983); *Hill v. Fiscal Court of Warren County*, Ky., 429 S.W.2d 419 (1968); *Williams v. Ehman*, Ky., 394 S.W.2d 905 (1965); *Rowland v. Miller's Adm'r, supra*.

Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476, 480 (Ky. 1991). Along the same lines, CR[2] 56.03 directs that summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories 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." Finally, when opposing a properly supported motion for summary judgment, a party cannot defeat it without presenting at least some affirmative evidence showing the existence of a genuine issue of material fact for trial. *See Gullett v. McCormick*, 421 S.W.2d 352 (Ky. 1967); *Continental Cas. Company v. Belknap Hardware & Manufacturing Co*., 281 S.W.2d 914 (Ky. 1955).

To successfully allege negligence, Johnson must establish Williams and Interlink (1) owed him a duty of care; (2) which they breached; and (3) thereby proximately caused Johnson's damages. *Illinois Cent. R. R. v. Vincent*, 412 S.W.2d 874, 876 (Ky. 1967). Thus, to find Williams and Interlink potentially liable, they had to owe an affirmative duty to Johnson to warn him of the impending danger caused by the earlier Lewis/Johnson collision. *Mullins v.*

[2] Kentucky Rules of Civil Procedure.

Commonwealth Life Ins. Co., 839 S.W.2d 245, 247 (Ky. 1992). The trial court found no such duty existed and we agree.

A "plaintiff sues in her own right for a wrong personal to her, and not as the vicarious beneficiary of a breach of duty to another." *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 343, 162 N.E. 99, 100 (1928). "What the plaintiff must show is 'a wrong' to herself, i.e., a violation of her own right, and not merely a wrong to some one (sic) else, nor conduct 'wrongful' because unsocial, but not 'a wrong' to any one (sic)." *Palsgraf,* 248 N.Y. at 343-44, 162 N.E. at 100. Under the facts of *Palsgraf,* a man carrying a package rushed forward to board a train as it was leaving the station. Fearing the man would fall, a guard on the train reached out to help him, while a guard on the station platform pushed him from behind. During the jostling, the man's package, unbeknownst to the guards containing fireworks, fell and exploded causing scales to fall some feet away and strike and injure Palsgraf. The court concluded the guards attempt to help the passenger steady himself on the train did not constitute negligence toward Palsgraf. As stated in the opinion, "before negligence can be predicated of a given act, back of the act must be sought and found a duty to the individual complaining . . . ." *Palsgraf,* 248 N.Y. at 99, 162 N.E. at 342. Johnson has failed to identify any duty owed specifically to him by Williams and Interlink. The rule, as explained in *Dixon v. Kentucky Utilities Co.,* 295 Ky. 32, 174 S.W.2d 19, 21-22 (1943) *quoting Seith v. Commonwealth Electric Co.*, 241 Ill. 252, 89 N.E. 425, 427, 24 L.R.A., N.S., 978, 132 Am.St. Rep. 204, is:

> [t]o constitute proximate cause the injury must be the natural and probable consequence of the negligence, and be of such a character as an ordinarily prudent person ought to have foreseen might probably occur as a result of the negligence. It is not necessary that the person guilty of a negligent act or omission might have foreseen the precise form of the injury; but, when it occurs it must appear that it was a natural and probable consequence of his negligence. If the negligence does nothing more than furnish a condition by which the injury is made possible, and that condition causes an injury by the subsequent independent act of a third person, the two are not concurrent, and the existence of the condition is not the proximate cause of the injury. Where the intervening cause is set in operation by the original negligence, such negligence is still the proximate cause, and where the circumstances are such that the injurious consequences might have been foreseen as likely to result from the first negligent act or omission, the act of the third person will not excuse the first wrongdoer. When the act of a third person intervenes, which is not a consequence of the first wrongful act or omission, and which could not have been foreseen by the exercise of reasonable diligence, and without which the injurious consequence could not have happened, the first act or omission is not the proximate cause of the injury. The test is whether the party guilty of the first act or omission might reasonably have anticipated the intervening cause as a natural and probable consequence of his own negligence, and, if so, the connection is not broken; but if the act of a third person, which is the immediate cause of the injury, is such as in the exercise of reasonable diligence would not be anticipated, and the third person is not under the control of the one guilty of the first act or omission, the connection is broken, and the first act or omission is not the proximate cause of the injury.

Here, time and Johnson's own inattentiveness intervened so as to make the award of summary judgment appropriate. *See Slinkard v. Babb,* 125 Ind.App. 76, 86 112 N.E.2d 876, 880 (1953).

For the foregoing reasons, the order of the Floyd Circuit Court, awarding summary judgment to Williams and Interlink is AFFIRMED.

ALL CONCUR.

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