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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000467-MR

ANGELINA MCCARTHY AS
EXECUTRIX FOR THE ESTATE OF
ROBERT LEE VENABLE — APPELLANT

v.

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JAMES R. SCHRAND II, JUDGE
ACTION NO. 15-CI-01442

COPELAND INVESTMENTS, INC
D/B/A MCDONALD'S — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, NICKELL AND THOMPSON, JUDGES.

DIXON, JUDGE: Appellant, Angelina McCarthy, as executrix for the Estate of Robert Lee Venable ("McCarthy"), appeals from an order of the Boone Circuit Court granting summary judgment in favor of Appellees, Copeland Investments d/b/a McDonald's ("McDonald's") in her wrongful death and negligence action.

On October 29, 2014, 63-year-old Robert Venable, deceased, went for lunch at a McDonald's restaurant in Florence, Kentucky. At 11:24 a.m., Mr. Venable ordered food and sat down at a booth in the restaurant. At some point, a McDonald's employee observed that Mr. Venable appeared to be sleeping. A short time later, another employee checked on Mr. Venable and discovered that his lips were blue, and he was unresponsive. It is unknown how long Mr. Venable had been in that state when he was discovered. A McDonald's employee called 911 at 12:42 p.m. and emergency personnel arrived at 12:47 p.m. When EMS arrived, Mr. Venable was already dead. According to the EMS records, Mr. Venable died due to cardiac/respiratory arrest. The complaint that was subsequently filed in this action alleged that Mr. Venable died due to obstruction of his airway by a food bolus. In either case, there is no evidence in the record that Mr. Venable showed any outward signs of distress prior to passing away.

McCarthy, who is Mr. Venable's daughter, was subsequently appointed by the Boone District Court as executor of his estate. On October 28, 2015, she filed a wrongful death action in the Boone Circuit Court asserting claims for wrongful death – negligence, wrongful death – reckless/wanton/gross negligence, and conscious pain and suffering. McCarthy claimed that McDonald's breached their duty of care to Mr. Venable, and that its negligence resulted in his death.

On February 23, 2016, McCarthy sent discovery requests and requests for production of documents. After inquiring several times on the status of McDonald's responses, McCarthy ultimately filed a motion to compel discovery on November 28, 2016. Although McDonald's finally served responses to the discovery requests on December 7, 2016, McCarthy claimed they were incomplete due to McDonald's objection to releasing the names and contact information for all employees that worked on the day Mr. Venable died. On December 14, 2016, McDonald's provided the names of all employees clocked in during the relevant time period. Only three of the sixteen employees known to have been clocked in on the day of Mr. Venable's death were still employed by McDonald's.

Shortly thereafter, on December 21, 2016, McDonald's filed a motion for summary judgment. McCarthy responded by filing a motion for a continuance of time to complete discovery. On February 20, 2017, McDonald's tendered its responses to McCarthy's second set of discovery requests wherein it provided the last known contact information for each of the twelve former employees. On February 21, 2017, the trial court granted McDonald's motion for summary judgment and denied McCarthy's motion for a continuance to complete discovery as being moot. This appeal ensued. After reviewing the record, we agree with the trial court that summary judgment was proper.

On appeal, McCarthy argues that the trial court's summary judgment order should be vacated because the court failed to allow sufficient time for the completion of discovery. Further, she asserts that the trial court's reliance on her failure to produce any witness who observed Mr. Venable in distress was in error because such reliance was solely the result of her having insufficient time to conduct interviews and depositions of witnesses.

Our 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." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). Summary judgment shall be granted "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. 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." *Steelvest v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Summary judgment is proper only "where the movant shows that the adverse party could not prevail under any circumstances." *Id.*

"Appellate review of a summary judgment involves only legal questions and a determination of whether a disputed material issue of fact exists." *Shelton v. Kentucky Easter Seals Society, Inc.*, 413 S.W.3d 901, 905 (Ky. 2013) (footnote omitted). "So we operate under a de novo standard of review with no need to defer to the trial court's decision." *Id.* Under that review, summary judgment should only be granted "when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant." *Steelvest*, 807 S.W.2d at 483 (quoting *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985)). "The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present 'at least some affirmative evidence showing that there is a genuine issue of material fact for trial.'" *Lewis v. B&R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001) (quoting *Steelvest*, 807 S.W.2d at 482). "'[I]mpossible' is used in a practical sense, not in an absolute sense." *Perkins v. Hausladen*, 828 S.W.2d 652, 654 (Ky. 1992).

McCarthy argues that McDonald's refusal to provide complete responses to her discovery requests until the day before the trial court granted summary judgment prevented her from obtaining information about potential witnesses to the incident in question. She contends that the trial court should have

granted her motion for a continuance to allow her time to contact those potential witnesses to gather evidence to oppose McDonald's motion for summary judgment.

McDonald's, on the other hand, points out that it did not refuse to provide the requested information, rather it initially objected to producing the name and contact information of each and every employee clocked in at any time during the day of the incident. It did, however, later provide the information over said objection. Nevertheless, McDonald's argues that in its initial discovery responses, it did provide the names of the three employees it believed to have knowledge of the facts and circumstances of what occurred on the day in question: Stephanie Turner, Angel Zeis, and Raistlyn Taylor. Of the three, only Stephanie Turner was still employed with McDonald's. Angel Zeis was the employee that made the 911 call and was named in the discovery responses as having interacted with Venable. Further, during McCarthy's deposition in October 2016, the parties also discussed whether Beth Craig, Director of Restaurant Operations, would have had any knowledge about the matter. Despite having knowledge that these employees were present at the time of the incident, McCarthy did not seek to depose any of them to further inquire about the details of the incident or whether there were any other potential witnesses.

CR 56.02 provides that "a party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, *at any time*, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof." (Emphasis added.) "The party opposing summary judgment cannot rely on their own claims or arguments without significant evidence in order to prevent a summary judgment." *Wymer v. JH Properties, Inc.*, 50 S.W.3d 195, 199 (Ky. 2001). Furthermore, the "hope or bare belief . . . that something will 'turn up,' cannot be made [the] basis for showing that a genuine issue as to a material fact exists." *Benningfield v. Pettit Environmental Inc.*, 183 S.W.3d 567, 573 (Ky. App. 2005) (quoting *Neal v. Welker*, 426 S.W.2d 476, 479-80 (Ky. 1968).

Moreover, "[i]t is not necessary that litigants be allowed to complete discovery but only that they be granted sufficient time to complete discovery and then fail to produce any evidence to create a genuine issue of material fact." *Martin v. Pack's, Inc.*, 358 S.W.3d 481, 485 (Ky. App. 2011). It is within the trial court's discretion to determine whether sufficient time for discovery has occurred. *Blankenship v. Collier*, 302 S.W.3d 665, 668 (Ky. 2010). If the non-moving party has failed to provide "specific examples of what discovery could have been undertaken that would have affected the outcome had it been conducted[,]"

granting summary judgment is not premature. *Benton v. Boyd & Boyd, PLLC*, 387 S.W.3d 341, 344 (Ky. App. 2012).

On appeal, if the issue of failure to be given ample opportunity to conduct discovery is raised, appellate courts must "consider whether the trial court gave the party opposing the motion an ample opportunity to respond and complete discovery before the court entered its ruling." *Blankenship*, 302 S.W.3d at 668. A trial court's determination that a sufficient amount of time has passed for discovery is reviewed for an abuse of discretion. *Id.*

McCarthy claims that Venable "choked to death while in Appellee's restaurant," and implies that McDonald's employees failed to render assistance. Further, the complaint alleges that "had Mr. Venable received medical treatment within a reasonable time, he would have survived." Yet, in her deposition McCarthy was asked if she had any information that could support the allegations in the complaint. She admitted she had none. She testified that she was unaware of any statements made by any McDonald's employees that Mr. Venable was observed in distress; she had no knowledge that any customers observed Mr. Venable in distress; and she had no knowledge that Mr. Venable was alive when the employee first noticed him. Significantly, McCarthy also had no basis for claiming that had Mr. Venable received treatment that he would have survived.

In its summary judgment order, the trial court observed that a negligence claim requires proof that: (1) there was a duty of care owed by the defendant; (2) the duty was breached; (3) there was an injury to the plaintiff; and (4) there was causation between the breach of duty and the injury sustained. *Wright v. House of Imports, Inc.*, 381 S.W.3d 209, 213 (Ky. 2012); *see also Pathways, Inc. v. Hammons*, 113 S.W.3d 85, 88-89 (Ky. 2003). The trial court pointed out that there was no evidence as to (1) how much time elapsed between the two employees observing Mr. Venable; (2) whether he showed any outwardly visible signs of distress; (3) when he actually passed away; or (4) that earlier medical intervention would have been successful. In granting summary judgment, the trial court concluded:

> In the instant case, it is undisputed that Mr. Venable was an invitee of the Defendant. As an invitee, the Defendant owed him a duty of reasonable care, or to discover the existence of dangerous conditions on its premises and either correct them or warn of them. *Perry v. Williamson*, 824 S.W.2d 869 (Ky. 1992). The record shows Mr. Venable ordered his food at 11:24 a.m. and the 911 call was made at 12:42:51. Emergency personnel were dispatched at 12:42:51 and arrived at 12:47:30. Upon arrival of emergency personnel, Mr. Venable was not breathing and was blue in color. The Plaintiff has not presented any evidence that Mr. Venable was observed, at any time, to be in distress, only that he appeared to be sleeping. Further, the Plaintiff has provided no affirmative evidence that the outcome would have changed based on a change in the Defendant's actions or if immediate action had been taken when the employee noticed Mr. Venable appeared to be sleeping.

We are of the opinion that based upon McCarthy's October 2016 deposition, and its belief that she could not produce any evidence pertaining to breach of duty and/or causation, McDonald's was clearly authorized under CR 56 to file a motion for summary judgment regardless of whether discovery was complete. We must agree with McDonald's that McCarthy offered no proof, admissible or inadmissible, to support any of the claims that she asserted in the complaint. She had knowledge of three employees that were present at the time of the incident and she chose not to depose them. Instead, she waited, attempting to gain contact information of sixteen individuals, the vast majority of whom had no involvement in serving or observing Mr. Venable on the day in question, for the purposes of conducting a fishing expedition to turn up anything to support her claims.

McCarthy argues that "this Court should not allow [McDonald's] to receive summary judgment for failure of proof when [it] was in possession of proof and refused to timely produce it . . . during normal discovery." However, what McCarthy fails to acknowledge is that the trial court did not just find that she did not prove her case, but also that could not prove her case under any circumstances. By McCarthy's own admission, there is no basis to indicate that any McDonald's employee acted negligently, let alone watched Mr. Venable "choke to death." McCarthy had every opportunity to allege that at least one employee or witness

that was present knew something that would support her factual allegations. Even more significant, McCarthy simply cannot satisfy the element of causation. While she makes the bald assertion that had Mr. Venable received medical treatment within a reasonable time, he would have survived, it is undisputed that he was already dead when EMS personnel arrived. McCarthy has put forward no evidence from which it can be determined when Mr. Venable passed away, nor has she provided proof, expert or otherwise, that he would have survived if medical treatment had been rendered sooner.

There is no question that Mr. Venable's death was tragic. Nevertheless, such does not alleviate the burden on McCarthy to prove her case or, at a minimum, produce "at least some affirmative evidence showing that there is a genuine issue of material fact for trial." *Lewis*, 56 S.W.3d at 436. (quoting *Steelvest*, 807 S.W.2d at 482). After carefully reviewing the record, we are compelled to agree with the trial court that there is a total lack of evidence that Mr. Venable ever showed any outward signs of distress or that the ultimate outcome would have been different based on a change in conduct of the McDonald's employees working at the time of his death. Consequently, we conclude that summary judgment was proper despite McCarthy having not completed discovery.

For the reasons set forth herein, the order of the Boone Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:
John C. Hayden
Newport, Kentucky

BRIEF FOR APPELLEE:
Brandon D. Daulton
Lexington, Kentucky