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Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002729-MR

CATHERINE WEBB, ADMINISTRATIX
OF THE ESTATE OF HARRY DEWAYNE
SMITH, DECEASED — APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE HUGH ROARK, JUDGE
ACTION NO. 98-CI-00024

GARY W. YATES; COCA-COLA BOTTLING
COMPANY OF ELIZABETHTOWN; JERRY M.
HATFIELD; LINDA PETERS; AND SANDRA ASH — APPELLEES

AND

NO. 2000-CA-000041-MR

CATHERINE WEBB, ADMINISTRATIX
OF THE ESTATE OF HARRY DEWAYNE
SMITH, DECEASED — APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE HUGH ROARK, JUDGE
ACTION NO. 98-CI-00024

GARY W. YATES; COCA-COLA BOTTLING
COMPANY OF ELIZABETHTOWN; JERRY M.
HATFIELD; LINDA PETERS; AND SANDRA ASH — APPELLEES

AND

NO. 2000-CA-000361-MR

CATHERINE WEBB, ADMINISTRATIX
OF THE ESTATE OF HARRY DEWAYNE
SMITH, DECEASED — APPELLANT

APPEAL FROM HARDIN CIRCUIT COURT
v. HONORABLE T. STEVEN BLAND
ACTION NO. 98-CI-00024

GARY W. YATES; COCA-COLA BOTTLING COMPANY OF ELIZABETHTOWN; JERRY M. HATFIELD; LINDA PETERS; AND SANDRA ASH APPELLEES

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

BEFORE: McANULTY, MILLER, AND TACKETT, JUDGES.

McANULTY, JUDGE: In these consolidated appeals by Catherine Webb, Administratrix of the Estate of Harry Dewayne Smith, we consider orders of the Hardin Circuit Court granting summary judgment to the appellees in a negligence lawsuit stemming from a series of three related automobile accidents. The third accident claimed the life of Smith. Appeal 1999-CA-002729-MR is from an order granting summary judgment to appellee Jerry M. Hatfield; Appeal 2000-CA-000041-MR is from an order granting summary judgment to appellees Gary W. Yates and Coca-Cola Bottling Company of Elizabethtown; and Appeal 2000-CA-000361-MR is from an order granting summary judgment to appellee Linda Peters. Because there are genuine issues of material fact regarding (1) the circumstances surrounding the accidents and (2) whether the various appellees were negligent in causing the death of Smith, the appellees are not entitled to summary judgment, and, as to each appeal, we reverse and remand.

These are summary judgment cases, and, in each individual case, we are required to review the facts in the light most favorable to Smith's estate, and resolve all doubts in favor of the estate. Toyota Motor Manufacturing, U.S.A., Inc. v. Epperson, Ky., 945 S.W.2d 413, 414 (1996). The material details of the accidents as set forth in the discovery depositions, beyond certain superficial facts, vary drastically. Three separate appeals are considered herein, and in our review of a particular appeal, in order to view the facts in the light most favorable to the estate, we must accept different facts as true depending upon the appeal under consideration. There is no single set of facts most favorable to the estate. To accommodate for this problem, we first set forth a general overview of the accidents. However, as each individual appeal is addressed, so as to view the facts in the light most favorable to the estate, we accept different facts as being true depending upon the appellee.

Sometime shortly after 6:00 a.m. on December 5, 1997, in Elizabethtown, Kentucky, appellee Jerry Hatfield was traveling southbound on the US 31W bypass (Elizabethtown bypass) in a Ford Ranger pickup truck just south of the College Street intersection. The Elizabethtown bypass at this point has three driving lanes, a paved left shoulder, and a paved right shoulder. It had snowed the night before, snow and patches of ice were on the highway, and a freezing rain may have begun to fall. As Hatfield approached and crossed the U.S. 31W bypass bridge

spanning U.S. 62 at a speed of 45 miles per hour, his truck spun out of control, struck the right concrete bridge railing, and came to rest angled north and blocking the entire right paved shoulder[1] of the roadway and blocking some portion of the right-most driving lane. Hatfield's vehicle was disabled due to the accident and had to be towed from the scene.

Linda Peters was following Hatfield's pickup truck in a Ford F-150 pickup truck. According to Peters, she saw the Hatfield accident and, as a precaution against being struck by the Hatfield vehicle, she slowed or stopped her truck. The Peters vehicle was thereafter rear-ended by a Chevy Cavalier driven by Sandra Ash. The point of impact in the Ash-Peters crash was south of the point of rest of the Ranger. As a result of this collision, Ash's vehicle came to rest blocking the left-most driving lane, according to Hatfield's testimony, or, according to Ash, the entire left shoulder and part of the left-most lane. The Peters vehicle came to rest south of the Ranger parked along the right shoulder. According to Hatfield, the Ash-Peters wreck occurred three to four minutes after his wreck; according to Peters, the accidents occurred contemporaneously.

Meanwhile, Gary Yates, also southbound on the bypass, approached the accident scene driving a commercial Coca-Cola delivery truck. Yates testified that he observed headlights

[1]The highway shoulders on the bridge are substantially narrower than the shoulders along the regular course of the highway, and are less than the width of a car.

spinning in the road, turned on his emergency blinkers, slowed, and then stopped, his truck at the northern entrance to the bridge. According to Yates, all driving lanes were blocked by vehicles, people were mingling in the roadway, and he could not drive the truck through the accident scene; however, other testimony states that the middle lane was clear and that Yates could have driven on through the multiple-accident scene. In any event, Yates stopped his delivery truck in the middle driving lane, shifted to park, and was preparing to exit his vehicle when the truck was struck in the rear by a car being driven by Harry Dewayne Smith, the appellant's decedent. Smith was killed in the collision. Police Officer Eddie McGarrah estimated in his police report that Smith was traveling 55 - 60 miles per hour at the time of the crash; the speed limit at that section of the bypass was 55 miles per hour.

Ash testified that the Yates-Smith accident occurred within 10 - 15 seconds after the Ash-Peters crash. Yates testified that he had been stopped for about one minute prior to the crash. Hatfield, on the other hand, testified that he lingered at the scene for five minutes and then went for help and, at that time, based upon his observations, the Yates-Smith accident had yet to occur.

Smith's estate eventually filed suit against Hatfield, Yates, Coca-Cola, Peters, and Ash. On November 3, 1999, the trial court granted summary judgment to Jerry Hatfield; on December 29, 1999, the trial court granted summary judgment to

Yates and Coca-Cola; and on February 4, 2000, the trial court granted summary judgment to Linda Peters.[2] Smith's estate filed these three appeals challenging the trial court's orders granting summary judgment. The cases were subsequently ordered consolidated by this court.

Appeal No. 2000-CA-000041-MR

For purposes of reviewing the trial court's three summary judgment orders, it is beneficial to begin with the Yates/Coca-Cola appeal, Appeal No. 2000-CA-000041-MR.

In order to qualify for summary judgment, the movant must "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." CR 56.03. On appeal, the standard of review of a summary judgment is whether the trial court correctly found that there was no genuine issue as to any material fact and that the moving party was entitled to judgment as a matter of law. The record must be viewed in the 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 should only be used when, as matter of law, it appears that it would be impossible for the respondent to produce evidence at

[2]Summary judgment was not granted to Sandra Ash. Ash was uninsured at the time of the accident and is in default in the estate's lawsuit against her.

trial warranting a judgment in his favor and against the movant. Id. at 483 (citing Paintsville Hospital Co. v. Rose, Ky., 683 S.W.2d 255 (1985)).

The basic facts were stated above; however, for purposes of this individual appeal, we must consider the facts in the light most favorable to the estate's position that the trial court erroneously granted summary judgment to Coca-Cola and Yates. This requires us to accept the testimony which supports the greatest elapse of time between Yates's arrival upon the scene and the Yates-Smith crash. In this vein we accept (1) Peters' testimony that her accident and Hatfield's accident occurred contemporaneously; (2) Yates's testimony that he was near enough to observe the previous accidents; and (3) Hatfield's testimony that he was at the accident scene for as long as five minutes prior to leaving, during which period, to his observation, the Yates-Smith crash did not occur.[3] Moreover, we accept Yates's testimony that he stopped his truck at a distance of 375 to 400 feet from Hatfield's Ranger. In addition, though Yates testified that he stopped because he could not get through the accident scene because the road was obstructed by the wrecked vehicles and mingling people, we accept the conflicting testimony that the middle lane was clear, and that Yates could have chosen

[3]While Hatfield's testimony may appear extreme in comparison with other witnesses' testimony, nevertheless, as the clear inference to be drawn from his testimony places the Coke truck as sitting in the middle of the road for the longest period, we must accept it for purposes of summary judgment.

to drive his truck safely through the accident scene and proceeded south. Further, based upon Yates's testimony that he was 375 to 400 feet from Hatfield's Ranger, we make the inference that he could have moved his truck to the right shoulder of the bridge, thereby avoiding blocking the open middle driving lane. Finally, based upon Officer McGarrah's testimony that, upon his arrival, he did not recall observing rear lighting on the Coke truck, we infer that a jury may conclude that the rear lighting of the Coke truck was not in operation prior to the Yates-Smith crash.

Smith's estate's claim against Yates and Coca-Cola is a tort negligence lawsuit. "It is a fundamental rule of tort liability that for negligence to be established there must have been (1) a duty owing decedent by appellants, (2) a breach of that duty which (3) was the proximate cause of the injuries which resulted in (4) damages. Negligence must be proven; it will never be presumed." Helton v. Montgomery, Ky. App., 595 S.W.2d 257, 258 (1980); Alderman v. Bradley, Ky. App. 957 S.W.2d 264, 267 (1997). "The concept of liability for negligence expresses a universal duty owed by all to all." Wemyss v. Coleman, Ky., 729 S.W.2d 174, 180 (1987) (quoting Gas Service Co., Inc. v. City of London, Ky., 687 S.W.2d 144, 148 (1985)). "The rule is that every person owes a duty to every other person to exercise ordinary care in his activities to prevent foreseeable injury." Grayson Fraternal Order of Eagles v. Claywell, Ky., 736 S.W.2d 328, 332 (1987); Seigle v. Jasper, Ky. App. 867 S.W.2d 476, 483

(1993). Motorists owe each other a duty of ordinary care. Louisville Taxicab & Transfer Co. V. Kelley, Ky., 455 S.W.2d 535, 536 (1970). Among the specific duties imposed upon a driver are the duties (1) to refrain from crossing the center line; (2) to have his automobile under reasonable control; (3) to drive at a speed no greater than was reasonable; (4) to exercise ordinary care generally to avoid collision; and (5) to keep a lookout. See Bass v. Williams, Ky. App., 839 S.W.2d 559, 561 - 562 (1992).

Aside from the general automobile negligence principles cited above, in the case of the Yates-Smith crash, an additional important tort negligence principle applies, negligence per se. KRS 189.450 provides that

> (1) No person shall stop a vehicle, leave it standing or cause it to stop or to be left standing upon any portion of the roadway; provided, however, that this section shall not be construed to prevent parking in front of a private residence off the roadway or street in a city or suburban area where such parking is otherwise permitted, as long as the vehicle so parked does not impede the flow of traffic. This subsection shall not apply to:
>
> . . . .
>
> (d) Any vehicle required to stop by reason of an obstruction to its progress.

It is well settled in this jurisdiction that violation of a traffic statute is negligence per se, or negligence as a matter of law. Woosley v. Smith, Ky., 471 S.W.2d 737, 738 (1971); Ross v. Jones, Ky., 316 S.W.2d 845 (1958); Saddler v. Parham, Ky., 249 S.W.2d 945 (1952).

Viewing the facts in the light most favorable to the estate, upon Yates's arrival at the accident scene he had a clear and open lane through which to drive the Coke truck. Alternatively, Yates had sufficient room, 375 to 400 according to his own testimony, and ample time, five minutes based upon the inferences to be drawn from Hatfield's testimony, to move his truck onto either the left or right shoulder of the bridge. It is not impossible that a jury would conclude that Yates breached his duty of ordinary care by failing to remove his truck from the open middle lane and by, instead, remaining parked in the only open driving lane in violation of a statute proscribing such conduct. Further, in light of the testimony that there was an open lane, a jury may conclude that the exception provided by KRS 189.450(d) is not applicable, thereby affixing fault upon Yates and his employer under the principles of negligence per se.

In support of summary judgment, Yates and Coca Cola rely heavily upon Clardy v. Robinson, Ky., 284 S.W.2d 651 (1955). In Clardy, a grain truck headed northbound came upon a hay truck broke down along the southbound side of the road. The hay truck driver, while examining his truck, was waving around a flashlight. The grain truck driver saw the disabled hay truck and the waving flashlight, thought he was being waved down, and stopped. Within a matter of seconds a coal truck, which had been following the grain truck some distance behind, struck the grain truck in the rear, killing a coal truck passenger. All of the witnesses, except the driver of the coal truck, testified that

stop lights and other lights on the back of the grain truck were burning at the time of the accident and after. The trial court directed a verdict in favor of the driver of the grain truck and this was affirmed in the Clardy opinion.

Viewing the facts in the light most favorable to the estate, however, the present case is distinguishable from Clardy. In this case, Yates testified that he was near enough to observe Hatfield's spinning vehicle, thereby placing Yates at the scene contemporaneously with the Hatfield wreck. Hatfield testified that he was at the bridge for as long as five minutes following his accident and that, during this period, he did not observe the Smith-Yates accident. In light of other testimony that the Smith-Yates crash occurred in close proximity to Hatfield's vehicle, it may be inferred from the foregoing that Yates sat in the middle lane for as long as five minutes. This case, therefore, involves, at least for purposes of summary judgment, a truck stopped for minutes, not seconds, as in Clardy. Clardy is not controlling in this case. We believe Butts v. Wright, Ky., 418 S.W.2d 653, 654 (1967) provides a better rule in this case:

> [T]here is no hard and fast rule which can be laid down in determining the question of negligence of a person failing to observe the presence of a standing vehicle ahead in time to stop or avoid it in safety. The surrounding conditions and circumstances of the particular case should be considered by the jury. The driver of the approaching vehicle is under the duty to exercise ordinary care, having regard for any unusual or extraordinary circumstances.

While a jury may ultimately find that Yates exercised ordinary care in his conduct when he came upon the accident scene, and that Smith was solely responsible for the crash, nevertheless, because it would not be impossible for the jury to find Yates partially at fault under the principles of comparative negligence, see Hilen v. Hays, Ky., 673 S.W.2d 713 (1984), Yates and Coca Cola were not entitled to a judgment as a matter of law. We therefore reverse the trial court's December 29, 1999 order granting summary judgment to Yates and Coca Cola and remand for further proceedings.

Appeal 1999-CA-002729-MR

Next, we consider the trial court's granting of summary judgment in favor of appellee Jerry Hatfield. Viewing the facts in the light most favorable to the estate's position that the trial court erroneously granted summary judgment to Hatfield, it may reasonably be inferred that the events of the morning of December 5, 1998, amounted to a single chain-reaction accident which was triggered when Hatfield lost control of his truck.

Hatfield testified that while crossing the bridge at 45 mph his truck slid on the ice and he lost control of his vehicle. Peters testified that she was immediately behind the Hatfield truck, that she applied her breaks to avoid hitting the Hatfield truck, and that she was hit by Ash before the Hatfield truck came to rest. Ash testified that the Coke truck approached to within 10 ft. of the Ranger, stopped within 10 to 15 seconds after the

Ash-Peters wreck, and that Smith crashed into the Coke truck 5 seconds after that. Accepting the foregoing testimony as true, the elapsed time between the Hatfield accident and the Smith-Yates crash was only 15 to 20 seconds, and the three individual wrecks amounted to, in effect, a single chain-reaction accident precipitated by the initial Hatfield wreck.

In addition to the foregoing, we accept Hatfield's testimony that he was driving 45 miles per hour when his truck spun out of control; the testimony that the highways were covered with patches of ice and snow that morning; Yates' testimony that a freezing rain had begun to fall; and Investigating Officer Eddie McGarrah's testimony that the bridge was so slick it was difficult to walk on it.

Hatfield had a duty to observe the hazardous road conditions and to keep his truck under control. Under the principles of comparative negligence, it would not be impossible for a jury to conclude that Hatfield was partially at fault in causing a chain-reaction accident on the basis that he was driving too fast for the road conditions as they existed the morning of December 5, 1997. Drawing all inferences in favor of the estate, Hatfield breached his duty to keep his vehicle under control by driving too fast for the road conditions.

Because there is a genuine issue of material fact as to Hatfield's comparative fault in causing the series of accidents that led to Smith's death, the trial court erred in granting

summary judgment to Hatfield, and we reverse the trial court's order of November 3, 1999, and remand for further proceedings.

Appeal 2000-CA-000361-MR

Lastly, we turn to the appeal granting summary judgment in favor of Linda Peters. As with the above defendants, the trial court erroneously granted summary judgment to Linda Peters.

For purposes of the Peters summary judgment appeal, we accept Hatfield's testimony that the Peters-Ash wreck occurred several minutes after his accident, and that when the Hatfield truck came to rest, it blocked at most the right shoulder and part of the right-most driving lane, leaving two driving lanes and the left shoulder open. We further accept the testimony of Ash that Peters came to a complete stop south of the disabled Hatfield truck. If Hatfield and Ash's testimony on these points is taken as true, it would not be impossible for a jury to believe that Peters was negligent for stopping and blocking the highway rather than continuing south on the bypass. Under these facts, the jury may believe that Peters was "rubbernecking" rather than, as Peters testified, avoiding the spinning Hatfield truck. In addition, Ash testified that the break-lights on the Peters vehicle did not work, implicating negligence per se, which a jury may believe was a contributing factor in the Ash-Peters crash. As with the Hatfield appeal, we also accept the testimony of Peters that the Coke truck arrived 10 to 15 seconds after the

Ash-Peters wreck and that Smith crashed into the Coke truck within 5 seconds after that.

Based upon the foregoing, there is a genuine issue of material fact as to whether any portion of the fault in Dewayne Smith's December 5, 1998 accidental death should be assessed to Peters. We therefore reverse the trial court's February 4, 2000 order granting summary judgment to Linda Peters and remand for further proceedings.

Summary

The discovery in this case reflects a tremendous disagreement regarding the facts surrounding the December 5, 1997 accident, particularly as to timing, road conditions, distances, and whether the middle driving lane was open. There are an abundance of genuine issues of material fact. Under our comparative fault system, depending upon which facts are ultimately believed by a jury, any, all, or none of the appellees could bear some portion of fault for the accidental death of Harry Dewayne Smith.

To summarize, as to each of the appeals considered herein, the trial court's order granting summary judgment is vacated, and the cases are remanded for additional proceedings consistent with this opinion.

ALL CONCUR.

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