

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2003-CA-001363-MR

CURTIS R. WILLIAMS; AND  
SUE WILLIAMS

APPELLANTS

v. APPEAL FROM HARDIN CIRCUIT COURT  
HONORABLE KELLY MARK EASTON, JUDGE  
ACTION NO. 03-CI-00271

THE KROGER COMPANY;  
KROGER DEDICATED LOGISTICS COMPANY;  
AND JAMES W. POPHAM

APPELLEES

OPINION  
AFFIRMING

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BEFORE: BUCKINGHAM, JOHNSON AND KNOPF, JUDGES.

JOHNSON, JUDGE: Curtis R. Williams and his wife, Sue Williams, have appealed from an order of the Hardin Circuit Court entered on June 13, 2003, which dismissed their complaint against The Kroger Company, Kroger Dedicated Logistics Company, and James W. Popham, for failure to state a claim upon which relief can be

granted.<sup>1</sup> Having concluded that the trial court did not err by dismissing the complaint, we affirm.

The relevant facts of this case are not in dispute. On February 15, 2002, Steve Williams, the son of Curtis and Sue, was driving his automobile in the southbound lane of Interstate-65 in Hardin County, Kentucky. Riding in the passenger seat was his wife, Grace Williams, while the couple's two children, Robert and Christian, occupied the back seat of the vehicle. On this same date, Popham was operating a tractor-trailer owned by Kroger Dedicated Logistics Company in the northbound lane of Interstate-65.

At around 5:37 a.m., Popham's tractor-trailer crossed the median of the interstate and collided with the vehicle being driven by Steve. Tragically, Steve, Grace and Christian died as a result of the collision, and Robert sustained serious physical injuries. Later that day, Sue was notified of the details of the accident. Upon hearing the news, Sue claims to have suffered severe emotional distress which led to a heart attack.

On February 12, 2003, Curtis and Sue filed a complaint in the Hardin Circuit Court naming The Kroger Company, Kroger Dedicated Logistics Company, and Popham as defendants. In their complaint, Curtis and Sue stated that Popham's alleged negligence in the operation of the tractor-trailer caused Sue to

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<sup>1</sup> See Kentucky Rules of Civil Procedure (CR) 12.02.

suffer severe emotional distress, which in turn led to Sue's heart attack. Sue sought damages for her alleged physical pain and mental suffering, past and future medical expenses, and lost earning capacity. In addition, Curtis asserted a loss of consortium claim due to Sue's alleged injuries.

On March 6, 2003, the named defendants filed a motion to dismiss, arguing that the complaint failed to state a claim upon which relief could be granted. On June 13, 2003, after a hearing on the matter had been conducted and after considering the briefs submitted by the parties, the trial court entered an order granting the defendants' motion to dismiss the complaint with prejudice. This appeal followed.

A motion to dismiss for failure to state a claim upon which relief can be granted should not be granted "unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim."<sup>2</sup> In the case sub judice, we hold that Curtis and Sue could not have prevailed under any set of facts in support of their claims, and that the trial court did not err by granting the defendants' motion to dismiss.

Curtis and Sue have conceded that all of their claims are based upon the cause of action commonly referred to as

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<sup>2</sup> Pari-Mutuel Clerks' Union of Kentucky, Local 541, SEIU, AFL-CIO v. Kentucky Jockey Club, Ky., 551 S.W.2d 801, 803 (1977).

negligent infliction of emotional distress. Consequently, the "contact rule" is implicated. In Deutsch v. Shein,<sup>3</sup> our Supreme Court discussed the requirements of the contact rule:

It is well established in this jurisdiction that "an action will not lie for fright, shock or mental anguish which is unaccompanied by physical contact or injury. The reason being that such damages are too remote and speculative, are easily simulated and difficult to disprove, and there is no standard by which they can be justly measured" [citation omitted].

In line with the corroborating purpose of this "contact" requirement, the amount of physical contact or injury that must be shown is minimal. Contact, however, slight, trifling, or trivial, will support a cause of action. However, it is necessary that the damages for mental distress sought to be recovered be related to, and the direct and natural result of, the physical contact or injury sustained [citation omitted].

In the case at bar, it is undisputed that Sue had no "contact" with the accident which occurred on February 15, 2002, and that she sustained no physical injuries from that accident. In their brief on appeal, Curtis and Sue advance various arguments in support of their claim that the "contact rule" should be abolished.<sup>4</sup> However, this state's highest court has considered the competing policy positions and has chosen to

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<sup>3</sup> Ky., 597 S.W.2d 141, 145-46 (1980).

<sup>4</sup> Curtis and Sue proffer various policy reasons in support of their argument that the rule should be abolished, and cite a case from Massachusetts in which that state's highest court abolished the rule. See Dziokonski v. Babineau, 380 N.E.2d 1295 (Mass. 1978).

adhere to the so-called "contact rule."<sup>5</sup> Accordingly, since the complaint failed to state a claim upon which relief could be granted, the trial court did not err by granting the defendants' motion to dismiss.

Based on the foregoing, the order of the Hardin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Larry B. Franklin  
Michael R. Hance  
Louisville, Kentucky

BRIEF FOR APPELLEES:

Mark S. Fenzel  
David J. Kellerman  
Louisville, Kentucky

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<sup>5</sup> Of course, we are required to follow the precedent of our Supreme Court. Kentucky Rules of the Supreme Court 1.030(8)(a). See also Wilhoite v. Cobb, Ky.App., 761 S.W.2d 625, 626 (1988).