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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002500-MR

WILLIAM CAUDILL — APPELLANT

v. APPEAL FROM BREATHITT CIRCUIT COURT
HONORABLE FRANK ALLEN FLETCHER, JUDGE
ACTION NO. 06-CI-00190

RANDALL CARPENTER;
AND WAYNE HARVEY — APPELLEES

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: CAPERTON, KELLER, AND NICKELL, JUDGES.

KELLER, JUDGE: William Caudill has appealed from the Breathitt Circuit Court's summary judgment dismissing his action against Randall Carpenter and Wayne Harvey, in which he sought damages for assault and battery. For the reasons set forth below, we vacate and remand.

This civil suit is one in a line of many civil actions and criminal complaints filed by neighboring residents of Jackson, Breathitt County, Kentucky, arising from a property dispute dating back to the 1980s. *See Caudill v. Crabtree*, appeal No. 1999-CA-002429-MR (rendered March 2, 2001); *Caudill v. Crabtree*, appeal No. 1993-CA-001961-MR (rendered August 25, 1995). The present action concerns an incident on May 22, 2005, wherein Caudill got into a dispute with Carpenter and Harvey over the driveway that has been the subject of the long-standing property dispute. Caudill filed a complaint against Carpenter and Harvey on May 13, 2006,[1] seeking damages for physical injuries he suffered as a result of assault and battery. [2]

On November 3, 2007, Carpenter and Harvey filed a motion for summary judgment. In support of their motion, Carpenter and Harvey recounted the criminal action that arose from the same dispute. They stated that Caudill filed criminal charges against them, while they likewise filed criminal charges against Caudill. The grand jury did not return an indictment based upon Caudill's allegations, but did return an indictment against Caudill for two counts of First-Degree Wanton Endangerment based upon Carpenter's and Harvey's complaints.

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[1] We note that the complaint lists the date of occurrence as May 22, 2006, which would have been impossible based on the filing date of the complaint. However, pursuant to an Agreed Order entered June 23, 2006, Caudill was permitted to amend his complaint to correct a typographical error. While an amended complaint was never filed, we assume that the amendment was to correct the year of the occurrence.

[2] This same panel has also been assigned the companion criminal case related to this incident, for which Caudill is seeking relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 following the entry of his guilty plea to two counts of second-degree wanton endangerment. *Caudill v. Commonwealth*, appeal No. 2007-CA-001796-MR.

Caudill eventually entered a guilty plea to amended misdemeanor charges of Second-Degree Wanton Endangerment. Because he pled guilty to his part in the incident, Carpenter and Harvey argued that Caudill could not maintain his civil action against them for assault and battery.

In response to the motion for summary judgment, Caudill first argued that Carpenter and Harvey did not meet the ten-day notice requirement of Kentucky Rules of Civil Procedure (CR) 56.03, as the motion was served on November 3, 2007, listing a hearing date of November 9, 2007. Accordingly, Caudill requested a continuance in order to provide him with necessary time to submit affidavits. Addressing the merits of the motion, Caudill argued that his admission to guilt on charges of Second-Degree Wanton Endangerment, not assault, in the criminal action was not conclusive in his civil action.

The circuit court heard arguments of counsel on November 9, 2007, at which time Caudill again objected to the motion being heard due to the notice violation. He also argued that the result in the criminal action had no impact on the civil action. The circuit court orally granted the motion for summary judgment, stating on the record that it was best for the neighborhood to end the litigation, as problems had existed for many years. Furthermore, the court expressed a concern that someone would get hurt. An order granting summary judgment and dismissing the action was entered on November 16, 2007. This appeal followed.

STANDARD OF REVIEW

"The 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).

> The trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor.

Lewis v. B & R Corp., 56 S.W.3d 432, 436 (Ky. App. 2001). "Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*." *Id.*

ANALYSIS

Caudill's first argument addresses the ten-day notice requirement prescribed in CR 56.03. That rule provides that "[t]he motion [for summary judgment] shall be served at least 10 days before the time fixed for the hearing." Carpenter and Hughes contend that Caudill in fact responded to their motion and addressed the merits of the issues raised in it, both in his written response and at the hearing. They also assert that additional time to prepare would not have resulted in a different ruling.

Caudill cites to *Equitable Coal Sales, Inc. v. Duncan Machinery Movers, Inc.*, 649 S.W.2d 415 (Ky. App. 1983), in support of his argument that the circuit court erred in hearing and ruling on the motion for summary judgment when

he was not provided with the mandatory notice period. In *Equitable Coal*, this Court, after noting that the rule clearly required at least ten-days' notice, addressed whether the ten-day notice requirement might be waived. It ultimately held "that the ten-day requirement of CR 56.03 may be waived absent a showing of prejudice." *Id*. at 416. In affirming, the *Equitable Coal* Court noted that counsel for the parties opposing the motion for summary judgment did not object to the hearing date, request a continuance, argue against the motion, or show any prejudice resulting from the short notice, thereby waiving the ten-day notice requirement.

In other cases, Kentucky's appellate courts have found reversible error based upon a violation of the notice requirement. In *Rexing v. Doug Evans Auto Sales, Inc.*, 703 S.W.2d 491 (Ky. App. 1986), this Court held that the trial court erred in refusing to grant a continuance when the party opposing a motion for summary judgment was not afforded a full ten days' notice as required by CR 56.03. In another case involving notice, but addressing a situation where notice of a motion was sent to an incorrect address, the former Court of Appeals stated, "[i]n the granting of a summary judgment, there must be a strict compliance with the legal prerequisites to establish the trial court's power to act summarily." *McAtee v. Wigland of Louisville, Inc.*, 457 S.W.2d 265 (Ky. 1970). The Court then held that "[a] notice mailed to an incorrect address and not received by the addressee is not in compliance with CR 5.02." *Id*. Finally, in *Koehler v. Com. by and ex rel. Luckett*, 432 S.W.2d 397 (Ky. 1968), the same Court held that the trial court did

not err in setting aside a prior order dismissing when the party opposing the earlier motion did not have ten days' notice of the hearing.

Turning to the present case, we hold that the circuit court erred when it heard and ruled on Carpenter and Harvey's motion for summary judgment without Caudill having been provided with the required ten-days' notice. Unlike the parties in *Equitable Coal*, Caudill did not waive the notice requirement, but objected to the hearing and requested a continuance both in his written response and at the November 9th hearing. He also established prejudice in that he was unable to obtain and file affidavits necessary to rebut the motion. Furthermore, we hold that this error was not harmless; therefore, we must vacate the circuit court's summary judgment and remand this matter for further proceedings.

Although we are vacating and remanding, we shall nevertheless address Caudill's second argument, which goes to the merits of Carpenter and Harvey's motion for summary judgment, in the event that the issues arise again on remand. At the outset, we note that the sole basis for the circuit court's ruling was that it would be best for the neighborhood to end the litigation. Although we certainly empathize with the circuit court's desire to improve the conditions of the neighborhood by working to bring the years of turmoil to a close, this does not meet the standard for granting summary judgment.

Caudill also addresses Carpenter and Harvey's argument below that he is collaterally estopped from bringing his civil suit due to the entry of a guilty plea in the criminal case arising from the same incident. He maintains that the

elements of Second-Degree Wanton Endangerment are different from the elements necessary to establish the tort of assault and battery, meaning that his guilty plea to a different offense should not preclude him from seeking relief in a civil suit. Furthermore, Caudill cites as authority several cases addressing this matter, which do not preclude suit, but permit the admission of judgments of conviction and allow the affected party to explain the circumstances. On the other hand, Carpenter and Harvey cite authority that states a party may not relitigate his admitted guilt in a collateral civil case.

We shall first address Carpenter and Harvey's cited authority. *Roberts v. Wilcox*, 805 S.W.2d 152 (Ky. App. 1991), involved a declaratory action wherein beneficiaries under a life insurance policy sought to preclude a decedent's husband from realizing any proceeds from the policy after he shot his wife and was convicted of reckless homicide. The *Roberts* Court first cited *May v. Oldfield*, 698 F. Supp. 124 (E.D.Ky. 1988), for the proposition that "[t]here is no question but that a criminal conviction can be used for purposes of collateral estoppel in a later civil action." *Roberts*, 805 S.W.2d at 153. The *Roberts* Court then addressed the primary issue before it: at what point in time a conviction becomes final so as to invoke the forfeiture provision of the insurance policy. That issue is not the issue before this Court. We have also reviewed *May v. Oldfield*, in which the federal district court held that the defendant's guilt in a separate criminal action collaterally estopped him from relitigating his guilt or innocence on that same issue

in a related civil action. 698 F. Supp. at 127. Again, that is not the issue before this Court.

Carpenter and Harvey also cite to *Ray v. Stone*, 952 S.W.2d 220 (Ky. App. 1997), in which this Court addressed whether a convicted felon who entered a guilty plea is permitted to sue his defense attorney for malpractice. The Court looked to decisions in other jurisdictions before relying upon the doctrine of collateral estoppel to prevent Ray from pursuing a legal malpractice action: "We conclude Ray is collaterally estopped from litigating the issue of his innocence in this forum. His guilty plea precludes him from now denying his guilt." *Id*. at 224-25. While we agree with the law as stated in the above cases, we do not believe that the law as expressed in those cases applies to the case presently before us, because we do not agree that Caudill is seeking to relitigate his second-degree wanton endangerment convictions.

We shall next examine the cases cited by Caudill. In *Wolff v. Employers Fire Ins. Co.*, 282 Ky. 824, 140 S.W.2d 640 (1940), *overruled in part on other grounds by Shatz v. American Surety Company of New York*, 295 S.W.2d 809 (Ky. 1956), the former Court of Appeals held as follows: "[A] judgment of conviction [is an] admissible circumstantial fact[] available to the party in whose favor [it is], in a later civil action involving the same facts as were determined in the criminal prosecution . . . ."[3] *Id*. at 645. In *Race v. Chappell*, 304 Ky. 788, 202 S.W.2d 626 (1947), the same Court addressed the use of a criminal conviction

[3] We have redacted the part of this quotation that was overruled in *Shatz*.

following the entry of a guilty plea by a defendant in a civil suit and whether the defendant should have been permitted to explain the circumstances. The Court held as follows:

> Ordinarily a judgment in a criminal transaction cannot be received in a civil action to establish the truth of the facts on which it was rendered, but where the defendant in the criminal case pleaded guilty, and the record showing such plea is offered in evidence in a civil action against him, growing out of the same offense, the judgment is admitted, not as a judgment establishing a fact, but as a declaration or admission against interest that the fact is so. However, the defendant may testify as to the circumstances under which the plea was made and explain the reasons for such plea.

304 Ky. at 792, 202 S.W.2d at 628.

We are mindful that the law concerning the doctrine of *res judicata* has evolved over the years. In *Sedley v. City of West Buechel*, 461 S.W.2d 556 (Ky. 1970), the former Court of Appeals expanded the doctrine of *res judicata* to include collateral estoppel, which does not require mutuality between the parties. However, in order to apply the doctrine to prevent relitigation of a criminal conviction in a later civil action, "the criminal judgment must of necessity finally dispose of the matters in controversy." *Gossage v. Roberts*, 904 S.W.2d 246 (Ky. App. 1995). It is clear that in this case the criminal judgment at issue, Caudill's second-degree wanton endangerment convictions, does not finally dispose of the matter in controversy, which is whether Carpenter and Harvey committed the tort of assault and battery.

Accordingly, we agree with Caudill and hold that Caudill is not precluded by the doctrine of collateral estoppel from maintaining a civil suit due to the entry of a guilty plea to Second-Degree Wanton Endangerment. Caudill is not seeking to relitigate his guilt on the wanton endangerment conviction; whether Caudill committed that offense does not mean that Carpenter and Harvey did not commit the tort of assault and battery against him. The grand jury's decision not to indict Carpenter and Harvey on criminal assault charges has no bearing on whether they can be held civilly liable for the tort of assault and battery. In our view, whether Carpenter and Harvey committed this tort is an issue of material fact that should be presented to a jury. On the other hand, we note that had Carpenter and Harvey been found guilty of assault in a criminal action relating to the same incident, they certainly would have been precluded from relitigating their guilt as defendants in the present civil action. *See Gossage,* 904 S.W.2d 246.

For the foregoing reasons, the judgment of the Breathitt Circuit Court is vacated and this matter is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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