

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-000104-MR

VALERIE AKEMON

APPELLANT

v. APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE SAMUEL T. WRIGHT III, JUDGE
ACTION NO. 06-CI-00205

C & S OIL PIPELINE CONSTRUCTION, L.L.C. AND
RICHARD BROWN

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON AND THOMPSON, JUDGES; LAMBERT,¹ SENIOR
JUDGE.

LAMBERT, SENIOR JUDGE: Valerie Akemon seeks our review claiming that an
erroneous jury instruction was prejudicial in a trial where she sought recovery for

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

negligent infliction of emotional distress. The jury returned a verdict against Akemon and upon review, we affirm.

Richard Brown was tending an oil well owned by C & S Oil Pipeline Construction. Oil was being pumped into a tanker truck. Valerie Akemon lived in a trailer nearby. A fire ensued that was sufficiently intense to melt the exterior of Akemon's trailer. Akemon claimed emotional distress from witnessing the fire and for the fear it caused.

Prior to trial, C & S Oil and Brown sought summary judgment. They claimed that mere heat was insufficient contact to support Akemon's claim for infliction of emotional distress. The trial court ruled that heat is sufficient contact, but reserved for the jury the question of whether the heat from the fire caused Akemon's injury. Akemon now argues the instruction given the jury included whether heat was sufficient contact and was therefore improper.

At trial, the jury found that Brown and/or C & S Oil Pipeline Construction violated the duty of ordinary care to provide for the safety of nearby persons and property. This included the specific duty to take reasonable measures to prevent fires from occurring during oil pumping operations. Nevertheless, the jury unanimously found for the defendants based on Instruction Number 4. That instruction is as follows:

You are instructed that in making a claim for damages for emotional distress, the Plaintiff, Valerie Akemon, must prove that she received physical contact from the fire at the well and that the emotional distress she claims is the result of such contact.

The law in Kentucky on recovery for emotional distress is clear. “[I]t is necessary that the damages from mental distress sought to be recovered be related to, and the direct and natural result of, the physical contact or injury sustained.” *Steel Technologies, Inc. vs. Congleton*, 234 S.W.3d 920, 929 (Ky. 2007).

Akemon’s burden of proof required her to prove both contact and causation. Without both elements, her claim must fail. The trial court’s ruling that heat was sufficient contact to defeat the motion for summary judgment, and the motion for a directed verdict, left open the factual question of whether the heat caused Akemon’s emotional distress. “[I]t is not enough that emotional distress be accompanied by contact – it must be *caused* by the contact.” *Id.* The instruction required the jury to answer that question, and its finding is supported by the evidence.

The judgment of the Letcher Circuit Court is affirmed.

CAPERSON, JUDGE, CONCURS.

THOMPSON, JUDGE, CONCURS IN RESULT ONLY.

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