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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001561-MR

JAMES HALL — APPELLANT

v.

APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE JOHN DAVID CAUDILL, JUDGE
ACTION NO. 07-CI-00609

PHILLIP MOORE; WILLIS LITTLE, JR.,
AND WANDA SLONE, INDIVIDUALLY
AND D/B/A SLONE'S TRUCKING — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, KELLER, AND MOORE, JUDGES.

CLAYTON, JUDGE: This is an appeal from the Floyd Circuit Court. The Appellant James T. Hall, asserts that the trial court erred in granting summary judgment to the Appellees. For the reasons that follow, we affirm the trial court's judgment.

FACTUAL BACKGROUND

Hall was involved in a motor vehicle accident in Floyd County, on July 29, 2005. Appellee Willis Little, Jr., overturned his loaded coal truck into a ditch located at the intersection of a mine road and Kentucky Route 122 in Price, Kentucky. Appellee Phillip Moore is an emergency worker who responded to Little's accident. Moore parked his emergency vehicle on the mine road and went to assist with the accident.

Hall loaded his truck at the mine and contends that he started down the mine road after he announced on the radio that he was starting down the hill. While going down the hill, Hall states that he observed Moore's pickup truck parked in the middle of the road about 300 or 400 feet from the intersection of the mine road and Rt. 122. Hall also contends that he did not see any lights on Moore's truck. Moore, however, stated that his emergency lights were on. Hall asserts that, while trying to stop, he lost air pressure in his brakes and could not stop. Hall then hit Moore's truck and proceeded to hit Little's truck.

Hall brought an action in the Floyd Circuit Court contending that he was injured in the accident. He asserted that Appellees Wanda Slone (the employer of Little), Little and Moore were negligent in their actions that day and their negligence caused his injuries. Slone had also filed suit against Hall and Double T Trucking, asserting that they were negligent. Slone, Little and Moore all filed motions for summary judgment, which the trial court granted. Slone's case against Hall and Double T continued to trial and the jury found that Hall and

Double T were not negligent. Hall now appeals contending that the trial court erred in granting summary judgment because there were questions of fact in controversy.

STANDARD OF REVIEW

In reviewing the granting of summary judgment by the trial court, an appellate court must determine "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." Kentucky Rules of Civil Procedure (CR) 56.03.

> [A] trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only [when] it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. [While] [t]he moving party bears the initial burden of [proving] that no genuine issue of material fact exists . . . 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."

Community Trust Bancorp, Inc. v. Mussetter, 242 S.W.3d 690, 692 (Ky. App. 2007).

Since summary judgment deals only with legal questions since there are no genuine issues of material fact, we "need not defer to the trial court's decision and [must] review the issue de novo. *Lewis v. B&R Corp*., 56 S.W.3d 432, 436 (Ky. App. 2001). With this standard in mind, we will review the issues before us.

DISCUSSION

Hall first contends that the trial court incorrectly granted summary judgment to Little and Slone by applying the doctrine of contributory negligence and by failing to consider the sudden emergency doctrine. In granting summary judgment to Little and Slone, the trial court held:

> The court finds that there is no genuine issue of material fact that the conduct of Willis Little, Jr., in putting his truck in the ditch at the exit of the mine road was not a substantial factor in causing the collision and damages claimed by Plaintiffs, James Hall and Double T Trucking. There was a significant passage of time between Little's incident and the Hall collision, there was significant intervening conduct by the emergency responders, and Plaintiff was comparatively negligent in failing to have his truck under proper control as he approached the intersection with Rt. 122, all of which were the proximate and substantial factors in the Hall collision. *Deutsch v. Shein*, 597 S.W.2d 141 (Ky. 1980); *The Estate of Wheeler v. Veal Realtors and Auctioneers, Inc.*, 997 S.W.2d 497 (Ky. App. 1999).

Judgment and Order at 1-2.

Hall is correct that Kentucky abandoned the theory of contributory negligence in *Hilen v. Hays*, 673 S.W.2d 713 (Ky. 1984). In its place, Kentucky adopted the theory of comparative negligence:

> where contributory negligence has previously been a complete defense, it is supplanted by the doctrine of comparative negligence. In such cases, contributory negligence will not bar recovery, but shall reduce the total amount of the award in the proportion that the claimant's contributory negligence bears to the total negligence that caused the damages.

Id. at 720. Appellees, however, argue that the trial court did not grant summary judgment based on a theory of comparative negligence alone, and contributory negligence was not relied on by the trial court at all.

As set forth above, a summary judgment should only be granted if there are no material questions of fact at issue. *Steelvest*, *Inc. v. Scansteel Service Center, Inc.*, 807 s.W.2d 476 (Ky. 1991). In this case, all parties agree upon the material facts. Hall's truck was out of control and hit Moore's vehicle, which was an emergency vehicle, then hit Little's truck that had overturned and was the accident for which the emergency vehicles were responding. Thus, we believe it was appropriate for the trial court to consider the summary judgment motions. The remaining question is whether or not the trial court correctly applied the law to those facts.

The trial court found that Little's accident was not the proximate cause of Hall's subsequent accident. Hall argues that Moore's emergency vehicle would not have been on the mine road but for Little's accident. In dealing with causation, the Kentucky Supreme Court in *Pathways, Inc. v. Hammons,* 113 S.W.3d 85, 92 (Ky. 2003), opined,

> The court has the duty to determine "whether the evidence as to the facts makes an issue upon which the jury may reasonably differ as to whether the conduct of the defendant has been a substantial factor in causing the harm to the plaintiff."

(Citations omitted). In this case, the facts do not create an issue upon which a jury might reasonably differ as to whether Little's conduct was a substantial factor in causing any harm to Hall.

In order to bring a successful negligence action against Little, Hall would have to establish that Little: (1) owed him a duty of care; (2) breached that duty; and (3) thereby proximately caused Hall's damages. *Illinois Cent. R.R. v. Vincent*, 412 S.W.2d 874, 876 (Ky. 1967). In *Dixon v. Kentucky Utilities Co.,* 295 Ky. 32, 174 S.W.2d 19, 21–2 (Ky. App. 1943) (quoting *Seith v. Com. Electric Co.,* 241 Ill. 252, 89 N.E. 425, 427, 24 L.R.A., N.S., 978, 132 Am.St. Rep. 204 (Ill. 1909)), the court explained proximate cause as:

> [t]o constitute proximate cause the injury must be the natural and probable consequence of the negligence, and be of such a character as an ordinarily prudent person ought to have foreseen might probably occur as a result of the negligence. It is not necessary that the person guilty of a negligent act or omission might have foreseen the precise form of the injury; but, when it occurs it must appear that it was a natural and probable consequence of his negligence. If the negligence does nothing more than furnish a condition by which the injury is made possible, and that condition causes an injury by the subsequent independent act of a third person, the two are not concurrent, and the existence of the condition is not the proximate cause of the injury. Where the intervening cause is set in operation by the original negligence, such negligence is still the proximate cause, and where the circumstances are such that the injurious consequences might have been foreseen as likely to result from the first negligent act or omission, the act of the third person will not excuse the first wrongdoer. When the act of a third person intervenes, which is not a consequence of the first wrongful act or omission, and which could not have been foreseen by the exercise of reasonable diligence, and

> without which the injurious consequence could not have happened, the first act or omission is not the proximate cause of the injury. The test is whether the party guilty of the first act or omission might reasonably have anticipated the intervening cause as a natural and probable consequence of his own negligence, and, if so, the connection is not broken; but if the act of a third person, which is the immediate cause of the injury, is such as in the exercise of reasonable diligence would not be anticipated, and the third person is not under the control of the one guilty of the first act or omission, the connection is broken, and the first act or omission is not the proximate cause of the injury.

The trial court was correct in its assessment that Little's accident was not the proximate cause of Hall's accident. While the trial court improperly implied that contributory negligence was a part of the basis for its judgment, we find that the trial court was correct in finding Little's accident was not the proximate cause of Hall's subsequent accident. Hall's accident was not the natural and probable results of Little's accident. Thus, we will affirm the summary judgment entered in favor of Little and Wanda Slone Trucking.

Next, Hall contends that the trial court also erred in granting summary judgment in favor of Moore. In finding in favor of Moore, the trial court held:

> The court finds that there is no genuine issue of material fact that the conduct of the Defendant, Phillip Moore, who[] is a volunteer member of the Left Beaver Fire and Rescue Squad, in parking his vehicle on Price Tipple Road while his emergency lights, dash mount lights, and headlights were activated to assist with the scene of the single accident involving Willis Little was not a substantial factor in causing the collision and damages claimed by Plaintiffs, James Hall and Double T Trucking. Defendant Phillip Moore was entitled to park his emergency vehicle on the roadway under these

> circumstances pursuant to KRS [Kentucky Revised Statutes] 189.940(4). Furthermore, the court also finds that there was sufficient sight distance that the Plaintiff had advance warning of the accident scene by way of Mr. Moore's vehicle and had the Plaintiff's brakes, which he admittedly was responsible for maintaining, [] been in proper working order, he could have avoided the impact.

Judgment and Order at 2.

Hall contends that there is an issue of fact as to whether Moore had his warning lights operating at the time of the accident. KRS 189.940 provides, in relevant part:

> (4) The driver of an emergency or public safety vehicle may stop or park his vehicle upon any street or highway without regard to the provisions of KRS 189.390 and 189.450, provided that, during the time the vehicle is parked at the scene of an emergency, at least one (1) warning light is in operation at all times.

Moore states that he did have warning lights on but that, regardless, he was parked far enough away that Hall would have been able to see him in time to stop had he not had brake issues. We agree. While there may be a dispute of whether or not Moore's emergency lights were operating at the time of the accident, it is not a material issue since it was daylight hours and there was sufficient sight distance between Moore's truck and Hall's. Similarly, Hall's sudden emergency argument is without merit. Thus, we find the trial court did not err in granting summary judgment to Moore. We, therefore, affirm the trial court's decision to grant summary judgment to Little, Slone, and Moore.

ALL CONCUR.

BRIEF FOR APPELLANT:

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