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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001365-MR
AND
NO. 2011-CA-001481-MR

MARK N. MUSIAL, IN HIS CAPACITY AS THE ADMINISTRATOR OF THE ESTATE OF JAMES SURRENA, DECEASED; AND SAMANTHA DOLINSKY, AS NEXT FRIEND OF JACOB ANTHONY DAVID DOLINSKY — APPELLANTS/CROSS-APPELLEES

v.

APPEAL AND CROSS-APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JOHN L. ATKINS, JUDGE
ACTION NO. 08-CI-00269

PTC ALLIANCE CORPORATION; ROY MARSHALL; AND KEITH GILKEY — APPELLEES/CROSS-APPELLANTS

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, LAMBERT, AND NICKELL, JUDGES.

LAMBERT, JUDGE: In this appeal arising from a wrongful death action, Mark N. Musial, as the administrator of the Estate of James Surrena, deceased, and Samantha Dolinsky, as next friend of Jacob Anthony David Dolinsky, (collectively, "the appellants") have appealed from the December 27, 2010, summary judgment of the Christian Circuit Court in favor of PTC Alliance Corporation, Roy Marshall, and Keith Gilkey (collectively, "the PTC Alliance defendants"). This order was made final and appealable upon the entry of a subsequent order on July 20, 2011. The PTC Alliance defendants have also cross-appealed from the November 15, 2010, order denying their motion to amend their answer to the complaint. This order was also made final and appealable by the July 20, 2011, order. We have considered the record and the parties' arguments in their respective briefs, and we affirm.

This action arose with the filing of a complaint on February 19, 2008, by the appellants following the death of James Surrena on January 11, 2007. At the time of his death, Surrena worked as a truck driver for Haslage Fleet Service, Inc. (Haslage). Haslage leased a 1996 International Tractor and a Transcraft TL-2000 flatbed trailer from Great American Lines. The flatbed trailer was equipped with a front end structure device, which was designed and manufactured by Fontaine Trailer Company in 1999 and then installed on the trailer. At the time the complaint was filed, it was believed that the device was intended to protect the driver from shifting cargo by preventing the cargo from breaking through the cab of the truck.

On January 9, 2007, Surrena was directed by his employer to pick up two loads of pipe the following day at the PTC Alliance plant in Hopkinsville, Kentucky. PTC Alliance employee Roy Marshall loaded all of the pipes onto the flatbed trailer, and Surrena secured it with straps. The pipes were of different sizes and lengths and were bundled. The bundles were bound by metal straps. Once loaded, Surrena was to take one load to Castle Metals in Illinois and the other load to Sodus Hardcrome in Michigan.

During the morning of January 11, 2007, Surrena was driving the tractor trailer on Interstate 65 near Indianapolis in Marion County, Indiana when he applied the brakes on his truck. At that time, the pipes shifted, hit the front end structure device, continued through the cab sheet metal, hit Surrena, and ultimately killed him.

On August 2, 2007, Mark Musial was appointed personal representative of Surrena's estate by order of the Probate Court of Lorain County, Ohio. At the time of his death, Surrena had three children, one of whom was still a minor; namely, Jacob Anthony David Dolinsky. Surrena or his estate incurred medical, funeral, burial, administration and attorney fees, and lost wages. On February 19, 2008, Musial and Jacob's mother, Samantha Dolinsky, both in their representative capacities, filed suit against PTC Alliance, PTC Alliance plant manager Keith Gilkey, Great American Lines, and Fontaine Trailer Company, as well as the unknown person at PTC Alliance who was responsible for loading the

trailer.[1] They sought damages against the PTC Alliance defendants for negligence and wrongful death pursuant to the Kentucky Wrongful Death Act, Kentucky Revised Statutes (KRS) 411.130, based upon their failure to meet their duty of reasonable care in the configuration and loading of the pipes on the flatbed trailer, which created a latent defect that manifested when Surrena was driving in Indiana. They alleged that this negligence was the proximate cause of Surrena's death and the subsequent damages. The appellants alleged negligence and wrongful death against Great American for breaching its duty to use reasonable care in inspecting the front end structure device. Against Fontaine Trailer, the appellants alleged negligence and strict products liability for its design and manufacture of the front end structure device because it failed in its purpose of protecting Surrena from the intrusion of the pipes into the cab.[2] In addition to these allegations, the appellants claimed that the actions of the defendants constituted gross negligence and requested punitive damages. For purposes of this opinion, we shall focus our attention, in large part, on the claims against the PTC Alliance defendants.

PTC Alliance and Gilkey filed an answer to the complaint,[3] listing as defenses, in part, the failure to state a claim upon which relief could be granted, lack of jurisdiction by reason of the Kentucky Motor Vehicle Reparations Act, and

[1] The unknown person was later identified as Roy Marshall.

[2] The appellants' products liability claim for the design and manufacture of the front end structure design was later dropped when it was determined that the device was meant only to protect the cargo, not the driver, and this claim became one for failure to warn and instruct of potential dangers.

[3] Roy Marshall had not yet been named as a defendant in the lawsuit.

negligence or contributory fault on the part of Surrena. In March 1998, PTC Alliance also filed a notice to remove the case to the United States District Court for the Western District of Kentucky, Paducah Division, based upon diversity. The District Court ultimately remanded the case back to the Christian Circuit Court due to lack of diversity.

The appellants moved to file a first amended complaint in August 2008 to name an additional defendant to the lawsuit; namely, Road Gear Truck Equipment, LLC, which company allegedly designed, manufactured, or sold the front end structure device.[4] The appellants moved to file a second amended complaint in October 2008 to add Randi & Associates Corp. d/b/a Trans Spec and/or d/b/a Trailer America as a defendant due to its potential liability.[5] The appellants also named the "John Doe" defendant from the original complaint as Roy Marshall, as he had been identified by PTC Alliance as a person with a role in arranging for the transportation of, or loading or stacking of, the pipes at issue in this suit. The second amended complaint was filed on October 10, 2008, and the appellants specifically alleged wrongful death and negligence against Marshall. The PTC Alliance defendants each filed an answer to the second amended complaint, stating similar defenses including lack of jurisdiction due to the Kentucky Motor Vehicle Reparations Act and Surrena's own negligence and his failure to adequately secure the pipes.

[4] Road Gear was dismissed with prejudice from the suit by agreed order entered February 24, 2009.

[5] All claims against Randi & Associates were dismissed by order entered September 16, 2010.

On January 9, 2009, the court entered an agreed docket control order and discovery plan, in which the matter was set for a two-week trial to commence on March 1, 2010. The agreed order included how discovery would proceed, and that discovery would be completed by December 31, 2010. Furthermore, other parties (if any) and amendments to pleadings (if any) were to be filed by June 1, 2009. The agreed docket control order was amended by agreement several times thereafter. PTC Alliance filed for bankruptcy protection in Delaware, and notified the court and parties in October 2009. Once the automatic bankruptcy stay was lifted in December 2009, the court entered another agreed order on February 4, 2010, continuing the March trial date and vacating the current docket control order and discovery plan. On July 21, 2010, the court entered an agreed docket control order and discovery plan, which provided that all discovery was to be completed by September 30, 2010, amendments to pleadings were due by March 12, 2010 (which date had already passed by the time the order was entered), scheduled a pre-trial conference for December 16, 2010, and scheduled a two-week trial to begin on February 14, 2011.

On October 29, 2010, the PTC Alliance defendants moved the court to amend their answers to the complaints pursuant to Kentucky Rules of Civil Procedure (CR) 15 to assert the exclusive remedy defense under the Kentucky Workers' Compensation Act. They cited to *Thornton v. Carmeuse*, 346 S.W.3d 297 (Ky. App. 2010), a recent Court of Appeals decision that addressed the applicability of workers' compensation "up the ladder" defense to a manufacturer

shipping goods through a federally-regulated motor carrier. The appellants objected to the motion to amend, noting that pursuant to the docket control order, amendments to pleadings were due on or before March 12, 2010, meaning that the motion was filed almost eight months after the cutoff date, and that the PTC Alliance defendants failed to establish excusable neglect pursuant to CR 15.01. By order entered November 15, 2010, the circuit court denied the motion to amend because the deadline to file an amended pleading had long past and the reasons cited for relief from that order were not persuasive.

On November 15, 2010, the PTC Alliance defendants filed a motion for summary judgment pursuant to CR 56, stating that they were entitled to a judgment in their favor because they had no duty in tort to Surrena, who was a common carrier not excluded by the shipper from the loading process. They also argued that there was no evidence to support a claim of negligence against Gilkey. In the attached memorandum, they cited to *Rector v. General Motors Corp.*, 963 F.2d 144 (6th Cir. 1992) (the *Rector* rule), to assert that a shipper does not owe a duty to a carrier's employee unless the shipper has exclusive control of the loading process. They discussed the rule announced in *United States v. Savage Truck Line, Inc.*, 209 F.2d 442 (4th Cir. 1953) (the *Savage* rule), as well as the explanation of this rule and the exception to it in *Decker v. New England Public Warehouse, Inc.*, 749 A.2d 762 (Me. 2000). Based upon these rules of law, the PTC Alliance defendants argued that they, as shippers, could not be held liable because they did not have exclusive control over the loading process and because Marshall's failure

to follow proper loading procedures related to distribution of the load over the wooden blocking and "belly-loading" the pipes too far from the ends of the trailer was observable and observed by Surrena. In addition, Fontaine Trailer and Great American both moved for summary judgment on various grounds.

In response to the PTC Alliance defendants' motion, the appellants asserted that Surrena had nothing to do with loading the pipes; he merely placed the straps onto the tubing Marshall had already loaded onto the trailer. As such, they argued that *Rector* was distinguishable, or that an issue of material fact existed with regard to whether PTC Alliance employees' actions constituted exclusive control and with regard to what Surrena and Marshall observed. During the December 16, 2010, hearing, the court orally ruled on most of the pending summary judgment motions, as well as other evidentiary motions, and it specifically granted the PTC Alliance defendants' motion for summary judgment. In so ruling, the court stated that *Rector* controlled the decision.

On December 27, 2010, the circuit court entered a written order memorializing its oral ruling granting the PTC Alliance defendants' motion for summary judgment, holding as follows: "These defendants are shippers and cannot be liable in tort to the plaintiff's decedent, James Surrena, a common carrier who was not excluded from the loading process; and there is no evidence to support a claim for negligence against Keith Gilkey." The order was not made final or appealable.

On July 20, 2011, the circuit court entered a final judgment, noting that the appellants' remaining claims had been settled and that the settlement had been approved by the probate court on June 21, 2011. Because all of the claims had been resolved by either summary judgment or settlement, the court made all prior judgments final and appealable. This appeal by the appellants and the cross-appeal by the PTC Alliance defendants follow.

On appeal, the appellants contend that the circuit court erred in applying *Rector* to the facts of this case, and that the circuit court should have applied the shipper exception set forth in *Savage*. The PTC Alliance defendants, on the other hand, contend that the law as set forth in *Rector* applies in this case, and that the circuit court did not err in granting summary judgment in their favor. In their protective cross-appeal, the PTC Alliance defendants contend that the circuit court should have permitted them to amend their answers in order to plead an additional affirmative defense.

Our standard of review in this case is well-settled:

> The standard of review on appeal when a trial court grants a motion for 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." 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. The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then 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." The trial court "must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists." While the Court in *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991),] used the word "impossible" in describing the strict standard for summary judgment, the Supreme Court later stated that that word was "used in a practical sense, not in an absolute sense." 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*. [Citations in footnotes omitted.]

Lewis v. B & R Corp., 56 S.W.3d 432, 436 (Ky. App. 2001).

The appellants do not contend that any disputed issues of material fact exist;[6] rather, they argue that summary judgment was unwarranted, citing to *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985), for the following statement of the law:

> The proper function for a summary judgment in a case of this nature "is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant." *Roberson v. Lampton*, Ky., 516 S.W.2d 838, 840 (1974). It is only proper where the movant shows that the adverse party could not prevail under any circumstances. *Kaze v. Compton*, Ky., 283 S.W.2d 204 (1955).

[6] The appellants appear to argue that factual issues exist regarding whether a latent defect was present due to PTC Alliance's failure to follow its loading policies and procedures and whether PTC Alliance had exclusive control over the loading policies and procedures. We disagree that these are disputed issues because the appellants did not present any affirmative evidence to rebut the facts as presented by the PTC Alliance defendants. *See Wymer v. J.H. Properties, Inc.*, 50 S.W.3d 195, 199 (Ky. 2001).

They contend that with the record construed in their favor and under the proper application of the law, summary judgment should not have been granted.

The circuit court held that *Rector*, *supra*, applied in this case and absolved the PTC Alliance defendants of any liability. In *Rector*, the Sixth Circuit U.S. Court of Appeals, construing Kentucky law, reviewed a grant of summary judgment in a case where the carrier's driver/employee was injured while unloading gears that the shipper had loaded onto a truck and which had spilled onto the floor of the tractor trailer. The issue was framed by the Court of Appeals as "whether a shipper owes a duty to a common carrier or its employees to load cargo into the carrier's vehicle in a reasonably safe manner." *Rector*, 963 F.2d at 146. The Court noted:

> While the case law nationally on this issue is sparse, it appears that, "[a]s a general rule, the carrier has the primary duty to load and unload goods or inanimate freight shipped in less than carload lots, and is liable for damages resulting from its failure to perform that duty in a proper manner." 13 Am.Jur.2d Carriers § 319 (1964) (emphasis added) (footnote omitted)[.]

Rector, 963 F.2d at 146.

However, the Court recognized "that courts have, in certain circumstances, found a shipper liable to a *consignee* of goods for injuries resulting from unloading where the shipper undertook the loading of the cargo." *Id*. at 147 (emphasis in original). Furthermore, "it would be illogical to hold a carrier liable to a consignee of the goods where it was the *shipper*, rather than the carrier, who had exclusive

control over the manner in which the goods were loaded." *Id*. (emphasis in original). Under the circumstances of that case, though, the Court held that:

> under Kentucky law, a shipper would not be held liable for the injuries of a common carrier's employee sustained while the employee unloaded the shipper's goods from the common carrier's vehicle where it was not shown that the shipper had exclusive control over loading the cargo.

Id. The Court pointed out that the carrier loaded the gears onto the truck, that the driver did not inspect the load, and that the carrier was in a position to know how the cargo had been loaded.

In their brief, the appellants contend that *Rector* does not apply to this case for three reasons: 1) Surrena was not the employee of a common carrier; 2) he was not injured while he was unloading the shipper's goods; and 3) the appellants made some showing that the shipper had exclusive control over the loading of the cargo. In conjunction with this argument, the appellants urge this court to apply the shipper exception rule as set forth in *Savage*, *supra*, and hold that because the defect in the loading of the pipes was latent, PTC Alliance as the shipper is liable. The PTC Alliance defendants argue that the *Rector* rule should apply. We hold that under either rule, the appellants cannot succeed.

Regarding the first argument, that Surrena was not an employee of a common carrier, we must agree with the PTC Alliance defendants that the appellants are not entitled to raise this argument on appeal, never having raised this particular argument before the circuit court.

> This Court has long held that a party may not argue one theory to the trial court and then a different theory to an appellate court, which is "without authority to review issues not raised in or decided by the trial court." *Ten Broeck Dupont, Inc. v. Brooks*, 283 S.W.3d 705, 734 (Ky. 2009). Recently, in *Fischer v. Fischer*, 348 S.W.3d 582 (Ky. 2011), this Court refused to consider an appellee's argument, which while similar to one made to the trial court, was not specifically argued to the trial court. As we noted, "when a movant states specific grounds . . . to the trial court, the court rules on those grounds. The court's decision, then, is essentially a denial of the movant's specific argument—of the grounds argued." The Court reiterated, "Specific grounds not raised before the trial court, but raised for the first time on appeal will not support a favorable ruling on appeal." *Id*.

Giddings & Lewis, Inc. v. Industrial Risk Insurers, 348 S.W.3d 729, 743-44 (Ky. 2011). Because the appellants did not raise any argument relating to whether Surrena worked for a "common carrier" before the circuit court so as to allow that court the opportunity to address the question, they may not do so now in this appeal. According, we shall decline to consider this argument.

Likewise, we disagree with the other two arguments the appellants make regarding *Rector*. It makes no difference that the injury in *Rector* came about during the unloading process; any issues there were with the cargo were related to the loading process, as was the case here. We also disagree that the appellants made any showing that PTC Alliance, as the shipper, had exclusive control over the loading of the cargo in this case. On the contrary, the evidence shows that Surrena was involved to some extent in the loading process, including placing the straps on the bundled pipes, which would have come after the pipes were loaded on

the trailer, but was still part of the process. Furthermore, Surrena observed the whole process as Marshall was loading the pipes onto the trailer, and he still signed the bill of lading and accepted the load.

Pursuant to the law as set forth in *Rector*, we must agree with the circuit court that the PTC Alliance defendants did not owe a duty to Surrena, and therefore cannot be held liable, because they did not have exclusive control over the loading of the pipes. Rather, Surrena played a part in the loading process. Therefore, because the shipper in this case did not have exclusive control of the loading process, the general rule as set forth in *Rector* would apply, and the carrier retains liability for the resulting damages. We note that *Rector* represents the most recent statement of Kentucky law on this area of the law.

We reach the same result if *Savage* were to be applied. In *Savage*, the Fourth Circuit Court of Appeals held as follows:

> The primary duty as to the safe loading of property is therefore upon the carrier. When the shipper assumes the responsibility of loading, the general rule is that he becomes liable for the defects which are latent and concealed and cannot be discerned by ordinary observation by the agents of the carrier; but if the improper loading is apparent, the carrier will be liable notwithstanding the negligence of the shipper.

Savage, 209 F.2d at 445. In *Decker*, *supra*, the Supreme Judicial Court of Maine extensively addressed the *Savage* rule, stating, in part:

> The rule propounded in *Savage* typically assigns to the carrier, here R.D. Roy and its drivers, the ultimate duty of care to ensure proper loading of cargo it carries. . . . The policy behind the *Savage* rule is well founded. The

> everyday practice and understanding in the trucking industry, as aptly reflected in the federal regulations on the subject, reflect that carriers logically should have the final responsibility for the loads they haul. No shipper, such as NEPW, can force a driver to accept a load that the driver believes is unsafe. *See* 49 C.F.R. § 392.9(b)(1) (2000). By the same token, a driver must take responsibility for the safety of his or her cargo by inspecting and securing the load. *See* § 392.9(b)(2). The *Savage* rule does not absolve shippers from all responsibility as they bear the onus when cargo has been loaded improperly and that defect is latent. The *Savage* rule simply extends the industry's reasonable understanding to negligence suits involving carriers and shippers.

Decker, 749 A.2d at 766-67 (footnotes omitted). Specifically regarding the exception set out in the rule, the *Decker* court observed:

> The exception to the general rule laid out by *Savage* occurs when the shipper loads cargo negligently and those loading defects are latent and concealed so that a reasonable inspection of the load by the carrier will not uncover the shipper's negligence. *See Symington v. Great Western Trucking Co.*, 668 F.Supp. 1278, 1282 (S.D. Iowa 1987). Additionally, some courts have cautioned that, "[w]hat is patent may depend in part upon the experience of the observer." *Alitalia v. Arrow Trucking Co.*, 977 F.Supp. 973, 984 (D.Ariz. 1997). The *Savage* rule does not demand abnormal scrutiny from carriers. It matters little if an extensive carrier inspection would have uncovered the shipper's negligent loading if a reasonable inspection by the carrier did not disclose the problem.

Decker, 749 A.2d at 767.

In the present case, we must agree with the PTC Alliance defendants that no latent defects were present that were unobserved by Surrena during the loading process. Rather, Surrena had been trained on proper loading configurations and

distribution, and how to inspect his trailer to insure the cargo was loaded and secured properly. Testimony established that Surrena approved Marshall's decision to "belly-load" the pipes in the center of the trailer as well as the location, when the proper method to load pipes was end-to-end rather than stacked up in the center. Accordingly, we must hold that because no latent defect existed, the carrier retained its duty of care and liability.

For the foregoing reasons, we affirm the summary judgment of the Christian Circuit Court in favor of the PTC Alliance defendants. Accordingly, the cross-appeal is rendered moot.

ALL CONCUR.

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