

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2011-CA-001574-MR

MARK B. WALLACE AND  
ELIZABETH PRATT WALLACE

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE MARY M. SHAW, JUDGE  
ACTION NO. 10-CI-007726

AUTO STORE, LLC

APPELLEE

OPINION  
AFFIRMING

\*\* \*\* \* \* \* \* \*

BEFORE: CLAYTON, COMBS, AND THOMPSON, JUDGES.

CLAYTON, JUDGE: Mark B. and Elizabeth Pratt Wallace appeal the Jefferson Circuit Court's grant of a summary judgment motion in favor of Auto Store, LLC.

After careful review, we affirm.

On May 7, 2010, a 2001 Nissan Sentra owned by Auto Store was involved in an automobile collision with a 2008 Volvo XC90, which was owned by the Wallaces. When the Sentra hit the Wallaces' car, it was parked on Cherokee Road. Witnesses observed the accident, and in fact, one witness recorded the Sentra's license plate. Subsequently, the Louisville Metro Police prepared and issued a traffic collision report and identified Auto Store as the owner of the vehicle.

The next day, the police contacted Auto Store and informed it about the collision involving the Sentra. During the phone conversation, the auto dealership informed the police that the car had been stolen from its lot. Personnel at Auto Store thought that this conversation with the police served as the official report concerning the vehicle's theft. Later, upon learning that the phone conversation was not sufficient, Auto Store made an official report of the theft with the Shively Police Department on June 1, 2010.

Prior to the official report being made, on May 14, 2010, the Wallaces contacted Auto Store, provided them with the accident report, and asked that Auto Store contact its insurance carrier to compensate the Wallaces for damages to the car. Since the Sentra was stolen prior to the collision, the automobile dealership did not believe that it was responsible for these damages. The Wallaces, however, doubted Auto Store's claim that the car was stolen. They acknowledge in their response to the motion for summary judgment that Auto Store would not be liable if the car was stolen but they argued that Auto Store did not establish that the car

was stolen. Additionally, they claimed that circumstances surrounding the auto dealership's actions suggest that the car was not stolen.

The Wallaces filed a complaint in Jefferson Circuit Court in November 2010. Following some initial discovery, Auto Store filed a motion for summary judgment. Thereafter, on June 29, 2011, the Wallaces filed a motion for a bench trial, which was granted. Nevertheless, on August 5, 2011, the trial court granted the summary judgment motion and stated in its order that its decision was “based upon the vehicle at issue being stolen from the Defendant at the time of the collision.” In addition, the trial court dismissed the Wallaces' complaint with prejudice. Because the Wallaces contend that Auto Store is merely claiming that the car was stolen, they now appeal this decision.

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Kentucky Rules of Civil Procedure (CR) 56.03. The grant of summary judgment is proper “where the movant shows that the adverse party cannot prevail under any circumstances.” *Steelvest, Inc. v. Scansteel Serv. Ctr, Inc.*, 807 S.W.2d 476, 479 (Ky. 1991)(citing *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255 (Ky. 1985)).

When considering a motion for summary judgment, the trial court must view the record “in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.” *Steelvest*,

807 S.W.2d at 480. But, “a party opposing a properly supported summary judgment motion cannot defeat [that motion] without presenting at least some affirmative evidence [demonstrating] that there is a genuine issue of material fact [requiring] trial.” *Id.* at 482 (citing *Gullett v. McCormick*, 421 S.W.2d 352 (Ky. 1967)).

The standards for reviewing a trial court’s grant of summary judgment on appeal are well-established. A concise summary was provided by our Court in *Lewis v. B & R Corp.*, 56 S.W.3d 432 (Ky. App. 2001):

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.

*Id.* at 436 (quoting *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996).

Moreover, “[b]ecause summary judgments involve no fact finding, [we] review the [trial] court’s decision *de novo*.” *3D Enters. Contracting Corp. v. Louisville & Jefferson County Metro. Sewer Dist.*, 174 S.W.3d 440, 445 (Ky. 2005).

On appeal, the Wallaces contend that the trial court improperly awarded summary judgment because its decision was a factual determination that actually involved a genuine issue of material fact. This contention relies on their claim that the outcome of this case rests completely upon whether the Sentra was stolen prior to the accident. Reasoning that this is a factual determination, they maintain that the entry of the summary judgment was flawed because summary judgment may only be granted when there is no genuine issue of material fact. The

Wallaces argue that the only evidence proffered by Auto Store were self-serving affidavits, which they have the right to challenge.

Indeed, they are correct that they have the right to challenge the affidavits, but the Wallaces did not do so. Here, they merely insinuated that Auto Store falsely stated that the car was stolen. Yet, all the evidence provided to the trial court indicates that the Sentra was stolen. Auto Store prepared two affidavits and the police report stated that the car was stolen. While it is accurate that the official report of the theft was delayed, Auto Store reasonably explained its delay in making the report.

An allegation without factual support does not create an issue of fact. And a trial court may grant a summary judgment upon its determination that no issues of material fact exist because of a lack of contradictory evidence by the party opposing the summary judgment motion. That is what occurred in this case, and we concur with the assessment of the trial court.

To summarize, in granting summary judgment, the trial court explicitly decided that no disputed issue of material fact existed, and hence, it would be impossible for the Wallaces to prevail at trial. This is clearly the correct standard upon which to decide the appropriateness of summary judgment. CR 56.03.

Accordingly, the judgment of the Jefferson Circuit Court is affirmed.

COMBS, JUDGE, CONCURS.

THOMSPON, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

Mark B. Wallace, *Pro se*  
Louisville, Kentucky

BRIEF FOR APPELLEE:

Daniel G. Brown  
James E. Smith  
Louisville, Kentucky