

RENDERED: NOVEMBER 1, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001691-MR
AND
NO. 2012-CA-001743-MR

ESTATE OF CHERYL ELAINE
POWERS, THROUGH ITS
ADMINISTRATORS, M. TODD RAY
AND WHITNEY DITTO

APPELLANT/CROSS-APPELLEE

v. APPEAL AND CROSS-APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KEN M. HOWARD, JUDGE
ACTION NO. 10-CI-00631

KATHLEEN MURPHY AND
ROBERT HORNBACK

APPELLEES/CROSS-APPELLANTS

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON, MOORE AND THOMPSON, JUDGES.

DIXON, JUDGE: Appellant, the Estate of Cheryl Elaine Powers (“Estate”),
appeals from several orders of the Hardin Circuit Court granting summary

judgment on certain claims and directing a verdict on its remaining claims in this wrongful death action. Appellees, Kathleen Murphy and Robert Hornback, have cross-appealed the denial of several of their summary judgment claims. For the reasons stated herein, we affirm the trial court.

This is a negligence and wrongful death action arising from the death of Cheryl Elaine Powers on October 24, 2009. On the day in question, Powers, who suffered from chronic obstructive pulmonary disease (“COPD”), called Hardin County E911 from her cell phone while in the lobby of the Vista Apartments in Radcliff, Kentucky. Appellee, Kathleen Murphy, was the dispatcher who took the call. During the exchange, Powers was evidently not able to speak clearly but attempted to give her address before the line disconnected. Murphy immediately called back the cell phone number but the line went directly to Powers’ voice mail message. Murphy then called Radcliff Police Dispatcher Tommy Shannon and relayed the conversation. Murphy explained that she thought the caller said 514 Vine Street in Vine Grove but that the information was coming up on her computer as 514 West Vine Street in Radcliff. After speaking with Shannon, Murphy replayed the 911 call and, approximately two minutes later, called Shannon a second time and relayed that she wasn’t sure she understood the caller clearly but that she may have said the words “Vista Apartments,” which did not sound familiar to Murphy.

After receiving Murphy’s second call, Shannon dispatched an officer to 514 West Vine Street, who reported that such address did not exist. Shannon then

“cleared” the call by informing the officer that there was no additional information. As a result, no emergency services responded to Powers’ call. The next morning, Powers’ boyfriend found her lying in the hallway of her apartment. She died sometime after calling 911.

In March 2010, Powers’ estate filed a negligence and wrongful death action in the Hardin Circuit Court against the City of Radcliff, Tommy Shannon, Jeff Cross (Radcliff Police Chief), and Sheila Enyart (Mayor of Radcliff). Shannon, Cross and Enyart were all named in their official and individual capacities. A subsequent amended complaint named the Hardin County, Kentucky E911 Center, Harry Berry (Hardin County Judge Executive), Robert Hornback (Administrator of the E911 Center), and Murphy. Berry, Hornback and Murphy were also sued in their individual and official capacities.

The Estate eventually reached a settlement with the City, Enyart, Cross and Shannon, and they were dismissed as parties in September 2011. In January 2012, the remaining defendants moved for summary judgment arguing (1) sovereign immunity, (2) the intervening negligence of Shannon’s failure to dispatch an officer to the Vista Apartments following Murphy’s second call, (3) that Powers’ social security disability payments could not be the basis for recovery under Kentucky’s wrongful death statute, and (4) that the Estate was not entitled to claim punitive damages.

In February 2012, the parties stipulated to the dismissal of all claims against the E911 Center and Berry, as well as those against Hornback and Murphy in their

official capacities. Subsequently, the trial court granted summary judgment in favor of Hornback, finding that there was no evidence that he was negligent in his training of Murphy. Further, the trial court determined that Murphy's decision to call the police dispatcher rather than the ambulance services involved the exercise of discretion and judgment. As such, she was entitled to qualified immunity with regard to that act. However, the trial court denied summary judgment on Murphy's defense of Shannon's intervening negligence in not dispatching an officer to the Vista apartments following her second call to him with additional information.¹ Finally, the trial court granted summary judgment in favor of Appellees on the issue of whether Powers' Social Security disability payments could be the basis for recovery under Kentucky's wrongful death statute, KRS 411.130. Relying upon *Aull v. Houston*, 345 S.W.3d 232 (Ky. App. 2010), the trial court ruled that damages under KRS 411.130 are measured by the loss resulting from the destruction of the decedent's power to labor. Because Powers had no ability to labor and did not "earn" her disability payments, such could not be a basis of recovery.

In August 2012, the case went to trial on the negligence claim against Murphy concerning her handling of Powers' 911 call. In its case-in-chief, the Estate presented the expert medical testimony of Dr. George Nichols. At the close of the Estate's evidence, Murphy moved for a directed verdict. After extensive

¹ Although the trial court did not so explicitly state, we presume that it found Murphy's responsibility to answer 911 calls and relate accurate information to be ministerial in nature and not protected by qualified immunity.

argument by the parties on the record, the trial court granted Murphy's motion finding that the Estate failed to provide that Murphy's initial misinterpretation of Powers' address and the subsequent delay in providing Shannon with the correct information was a substantial factor or cause in Powers' death. Accordingly, all claims against Murphy were dismissed. The Estate thereafter appealed to this Court. Additional facts are set forth as necessary.

On appeal, the Estate claims that the trial court erred by (1) granting a directed verdict in favor of Murphy, because a jury could have concluded that timely medical attention would have prevented Powers' death; (2) ruling that Hornback and Murphy were entitled to qualified immunity; and (3) ruling that the Estate could not recover Powers' lost disability payments under the wrongful death statute. In addition, Murphy and Hornback filed a joint cross-appeal arguing that (1) all of Murphy's actions in handling the 911 call were discretionary in nature and covered by qualified immunity, and (2) Hornback and Murphy were entitled to summary judgment based upon the intervening/superseding negligence of Shannon. Because our resolution of whether the trial court's directed verdict was proper could necessarily render all other issues moot, we turn to that issue first.

On a motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the party opposing the motion. Generally, "a trial judge cannot enter a directed verdict unless there is a complete absence of proof on a material issue or if no disputed issues of fact exist upon which reasonable minds could differ." *Bierman v. Klapheke*, 967 S.W.2d 16, 18–

19 (Ky. 1998). If there is conflicting evidence, it is the jury's responsibility to determine and resolve such conflicts, as well as any matters affecting the credibility of witnesses. *National Collegiate Athletic Ass'n By and Through Bellarmine College v. Hornung*, 754 S.W.2d 855, 860 (Ky. 1988) (Citing *Cochran v. Downing*, 247 S.W.2d 228 (Ky. 1952)). Therefore, when a directed verdict motion is made, the court may not consider the credibility or weight of the proffered evidence because this function is reserved for the trier of fact. *National*, 754 S.W.2d at 860.

When engaging in appellate review of a ruling on a motion for directed verdict, the reviewing court must ascribe to the evidence all reasonable inferences and deductions which support the claim of the prevailing party. *Meyers v. Chapman Printing Co., Inc.*, 840 S.W.2d 814 (Ky. 1992). In reviewing the sufficiency of evidence, this Court must respect the opinion of the trial court that heard the evidence. A reviewing court is rarely in as good a position as the trial court that presided over the initial trial to decide whether a jury can properly consider the evidence presented. Once the issue is squarely presented to the trial court, which heard and considered the evidence, a reviewing court cannot substitute its judgment unless the trial court is clearly erroneous. *Bierman*, 967 S.W.2d at 18.

This is a negligence case, which requires proof that (1) the defendant owed the plaintiff a duty of care, (2) the defendant breached the standard by which his or her duty is measured, and (3) consequent injury resulted. *Mullins v.*

Commonwealth Life Insurance Co., 839 S.W.2d 245, 247 (Ky. 1992) (Citing *Illinois Central R.R. v. Vincent*, 412 S.W.2d 874, 876 (Ky. 1967)). As the trial court noted, for the purposes of the directed verdict motion, Murphy's duty and breach of duty were presumed. Thus, the critical analysis was whether Murphy's misinterpretation of the 911 call and the subsequent delay in relaying Powers' correct location to Shannon was a substantial factor or cause of Powers' death.

The trial court herein relied upon our Supreme Court's decision in *Pathways, Inc. v. Hammons*, 113 S.W.3d 85, 91-92 (Ky. 2003), wherein the court explained causation as follows:

In *Deutsch v. Shein*, Ky., 597 S.W.2d 141, 143–44 (1980), we adopted the substantial factor test for causation set forth in § 431 of the *Restatement (Second) of Torts*, which is entitled “What Constitutes Legal Cause.” This section states in pertinent part that the “actor's negligent conduct is a legal cause of harm to another if his conduct is a substantial factor in bringing about the harm.” Comment (a) to § 431 explains what is meant by “substantial factor”:

In order to be a legal cause of another's harm, it is not enough that the harm would not have occurred had the actor not been negligent. . . . [T]his is necessary, but it is not of itself sufficient. The negligence must also be a substantial factor in bringing about the plaintiff's harm. The word “substantial” is used to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense, in which there always lurks the idea of responsibility, rather than in the so-called “philosophic sense,” which includes every one of the great number of events without which any happening would not have occurred. Each of these events is a cause in the so-called “philosophic sense,” yet

the effect of many of them is so insignificant that no ordinary mind would think of them as causes.

Section 434 of the Restatement (Second) of Torts addresses the issues of when legal causation is a question of law for the court and when it is a question of fact for the jury. 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.” § 431(1)(a). This standard is consistent with Kentucky law. *See, e.g., McCoy v. Carter*, Ky., 323 S.W.2d 210, 215 (1959). (Legal causation presents a question of law when “there is no dispute about the essential facts and [only] one conclusion may reasonably be drawn from the evidence.”) *See also* 57A Am.Jur.2d, *Negligence* § 446 (1989).

Significantly, the plaintiff in this type of case must introduce evidence which “affords a reasonable basis for the conclusion that it is more likely than not that the conduct of a defendant was a substantial factor in bringing about the result. A mere possibility of such causation is not enough and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.” *Texaco, Inc. v. Standard*, 536 S.W.2d 136, 138 (Ky. 1975) (Citation omitted).

The Estate’s only testimony regarding Powers’ physical condition on the night in question and her subsequent cause of death was from its medical expert, Dr. George Nichols. Dr. Nichols testified that Powers died from “decompensation” of COPD. On cross-examination, Dr. Nichols was asked, “If prompt medical attention had gotten to Ms. Powers would she have survived?” and

answered, “Yes, she died from asphyxia, the medical term for deprivation of oxygen. If oxygen had been supplied to her *effectively* (emphasis in original oral testimony) then this would have been reversible . . . her course on that moment would have been reversible.” However, Dr. Nichols clarified his use of the word *effectively* by stating, “I can’t say whether [prompt emergency treatment] would be effective or not in this case because it was not applied.” “I do not know the answer in this particular case, it is an unknown.” Dr. Nichols further explained that it was not possible to determine how effective treatment would have been “because there is an evaluation of this disorder (referring to COPD) that is ongoing over a period of time.” Thus, Dr. Nichols concluded that he did not have enough information to know if prompt medical attention would have been effective for Ms. Powers. Dr. Nichols was also asked how long after the 911 call did Ms. Powers live and testified, “I do not know.”

In its directed verdict order, the trial court stated,

While it is the jury’s province to weigh evidence, the court will direct a verdict where there is no evidence of probative value to support the opposite result and the jury may not be permitted to reach a verdict based on mere speculation or conjecture. (Citations omitted).

The Estate’s only evidence as to causation was Dr. Nichols who simply could not opine that but for the actions of Murphy, Ms. Powers would have survived her COPD episode. Considering the evidence in favor of the Estate as required in this directed verdict, there is an absence of evidence to guide or assist a jury as to legal causation. If Dr. Nichols could not reach such a conclusion based on the available evidence, a reasonable jury could not. A jury would be required to reach a

verdict based on mere speculation or conjecture as to causation. The law does not allow such a verdict.

There can be no question that what Powers experienced on the night in question was terrible and the result was tragic. Nevertheless, such does not alleviate the burden on the Estate to prove its case. The Estate was required to prove that, but for Murphy's initial mishandling of the 911 call, Powers would have survived her COPD episode. In other words, the Estate had to establish that Murphy's negligence was a substantial factor in bringing about Powers' death. However, even the Estate's expert could not answer that question with any certainty. Could she have survived? Possibly. But Dr. Nichols conceded that the answer was an "unknown" because whether prompt treatment would have been effective was based, in part, upon her physical condition and advancement of the COPD, information he simply did not have.

After reviewing the video, it is clear to this Court that the trial court spent considerable time analyzing this issue, and plainly struggled with granting the direct verdict given the facts of this case. However, the trial court reasoned that if the Estate's medical expert could not reach a conclusion as to causation based upon the available evidence, then a reasonable jury certainly could not, and any verdict would be based purely on speculation and conjecture. We must agree.

The trial court had the duty to determine whether the Estate's evidence created an issue upon which the jury could have reasonably differed as to whether Murphy's actions were a substantial factor in causing Powers' death. The mere

possibility such causation is insufficient, and “when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced” it was the duty of the trial court to direct a verdict. *Texaco, Inc.*, 536 S.W.2d at138. We conclude that the trial court’s decision to grant a directed verdict was proper.

Because we have affirmed the trial court’s directed verdict in favor of Murphy, which dismissed all remaining claims in this case, all other issues on appeal are necessarily rendered moot.

THOMPSON, JUDGE, CONCURS.

MOORE, JUDGE, CONCURS IN RESULT ONLY.

BRIEFS FOR APPELLANT/CROSS-
APPELLEE:

Kent Wicker
Jennifer A. Schultz
Louisville, Kentucky

BRIEF FOR APPELLEES/CROSS-
APPELLANTS:

R. Keith Bond
 Elizabethtown, Kentucky