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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001795-MR

TONYA HAYES — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARY M. SHAW, JUDGE
ACTION NO. 13-CI-000535

GUS GOLDSMITH
AND TROY HAYES — APPELLEES

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: DIXON, NICKELL, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Tonya Hayes brings this appeal from Findings of Fact, Conclusions of Law, and Judgment of the Jefferson Circuit Court entered August 4, 2014, granting Gus Goldsmith a judgment against Tonya and Troy Hayes, jointly and severally, in the amount of $12,033, and the court's Opinion and Order entered October 1, 2014, awarding prejudgment interest and denying the Hayes'

post-judgment motions. For the reasons stated, we affirm in part, reverse in part, and remand.

In June 2009, Troy and Tonya's house suffered roof damage during a storm. They had the house insured with Kentucky Farm Bureau. On September 1, 2009, Farm Bureau issued a check for insurance proceeds from the storm damage claim to Troy Hayes, Tonya Hayes, and Gus Goldsmith jointly, in the amount of $12,033.48. Gus Goldsmith was the holder of a mortgage against the house.[1] On September 2, 2009, the insurance check was deposited into Tonya's account at Kentucky Telco. There is no dispute that Goldsmith's endorsement on the check was forged. Troy and Tonya acknowledged endorsing the insurance check but neither admitted forging Goldsmith's signature. In fact, both parties claimed the other was responsible for obtaining Goldsmith's signature.

On September 25, 2009, Tonya withdrew $15,776 from her Kentucky Telco account and deposited $15,000 into a new account she opened at BB&T. Over the next few weeks, Farm Bureau issued two additional insurance checks to Troy and Tonya in the amount of $6,634.52 each. The checks were made payable to Troy and Tonya only and represented payment for roof damage to two other

[1] The record on appeal does not contain any document evidencing Gus Goldsmith's mortgage claim in the real property at issue. However, at the bench trial conducted July 11, 2014, counsel for Troy Hayes and counsel for Tonya Hayes conceded on the record that Goldsmith held a superior mortgage claim against the subject property and was entitled to the insurance proceeds.

houses the parties owned. Goldsmith did not have a lien claim against either of these houses and, thus, was not a payee on these two checks. Ultimately, the insurance proceeds from all three checks wound up in the bank account at BB&T.

On January 31, 2013, Goldsmith filed a complaint in the Jefferson Circuit Court against Troy and Tonya alleging they had converted his property by forging his signature and cashing the insurance check.[2] Pursuant to Kentucky Rules of Civil Procedure (CR) 52.01, a bench trial was conducted on July 11, 2014. Before opening statements were presented and before any evidence was introduced, Goldsmith moved for a directed verdict upon the issue of liability for conversion of the proceeds of the insurance check in the amount of $12,033 and requested judgment in his favor. The circuit court granted the directed verdict as to Troy and Tonya's liability for conversion of the insurance check and awarded judgment in the amount of $12,033 to Goldsmith. At this point, the circuit court indicated that the only issue to be resolved at trial was the apportionment of liability between Troy and Tonya. The court immediately conducted a bench trial, hearing testimony from Troy and Tonya on the fault allocation issue, along with

[2] The record reflects that the complaint was filed on January 31, 2013. Prior to the filing of this action, Troy and Tonya were divorced. At trial, the parties referenced an answer to the complaint, along with a crossclaim and counterclaim. However, upon review of the record on appeal, we are unable to locate an answer or other pleadings in the court file.

the arguments of counsel. Following closing arguments, the circuit court took the matter under submission.

On August 4, 2014, the circuit court rendered its Findings of Fact, Conclusions of Law, and Judgment. Therein, the circuit court recited that it directed a verdict upon the liability issue against Troy and Tonya for conversion of the insurance check and awarded judgment in the amount of $12,033 to Goldsmith. The circuit court found that it could not allocate fault between Troy and Tonya because the "evidence at trial regarding the identity of the forger was inconclusive . . . [and] it appears that both Defendants at least had access at some point to the accounts and funds in question." Therefore, the circuit court entered judgment in favor of Goldsmith against "Troy Hayes and Tonya Hayes, jointly and severally, in the amount of $12,033.00."

Tonya subsequently filed a motion to alter, amend, or vacate seeking an apportionment of fault between her and Troy or, in the alternative, a judgment awarding her indemnity against Troy for any money she might be required to pay Goldsmith. By order and judgment entered October 1, 2014, the circuit court denied Tonya's motion. This appeal follows.

This Court is compelled to initially recognize that certain procedural aspects of this case are highly irregular and legally improper. The circuit court conducted a bench trial pursuant to CR 52 but inexplicably rendered a directed

verdict for Goldsmith before opening statements by counsel and before presentation of any evidence. It is well-established that "a directed verdict is clearly improper in an action tried by the court without a jury." *Brown v. Shelton*, 156 S.W.3d 319, 320 (Ky. App. 2004) (citing *Morrison v. Trailmobile Trailers, Inc.*, 526 S.W.2d 822 (Ky. 1975)). In a bench trial, the proper procedural mechanism for early dismissal is found in CR 41.02(2). However, under CR 41.02(2), a defendant may only move for dismissal at the close of plaintiff's presentation of evidence.

Neither Troy nor Tonya raised this procedural error at trial or on appeal.[3] Nonetheless, this Court has a duty to address the issue, even if not properly raised, where the facts demonstrate that ignoring the issue would result in "a misleading application of the law." *Slone v. Calhoun*, 386 S.W.3d 745, 748 (Ky. App. 2012) (citing *Mitchell v. Hadl*, 816 S.W.2d 183 (Ky. 1991)). In this case, the circuit court's granting of a directed verdict in the bench trial before presentation of any evidence constitutes a misleading application of the law. However, upon close review of the record, under the circumstances of this case, we find this error harmless. At the beginning of the bench trial, both counsel for Troy and Tonya conceded that Goldsmith was entitled to a judgment, reserving for trial the allocation of liability against Troy and Tonya for Goldsmith's judgment.

[3] Troy did not file a notice of appeal or cross-claim or file an appellee brief in this appeal.

Accordingly, we will treat the granting of judgment for Goldsmith as a partial summary judgment and affirm the same with the court then reserving for trial the remaining disputed issue of allocation of liability between Troy and Tonya. *See* CR 56.04.

In addressing the contested issue on appeal, Tonya argues that the circuit court committed reversible error by holding Troy and Tonya jointly and severally liable for the $12,033 judgment. Tonya argues that the circuit court should have apportioned fault between the two defendants in accordance with KRS 411.182.[4]

In Kentucky, the law is well-settled that our comparative fault statute, KRS 411.182, mandates apportionment of fault in all tort actions, including intentional torts. *Hilsmeier v. Chapman*, 192 S.W.3d 340 (Ky. 2006); *Radcliff Homes, Inc. v. Jackson*, 766 S.W.2d 63 (Ky. App. 1989). This case clearly looks

[4] Kentucky Revised Statutes (KRS) 411.182 is Kentucky's comparative fault statute and provides, in pertinent part, as follows:

> (1) In all tort actions . . . involving fault of more than one (1) party to the action . . . the court . . . shall make findings indicating:
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> . . .
>
> (b) The percentage of the total fault of all the parties to each claim that is allocated to each claimant, defendant, third-party defendant, and person who has been released from liability under subsection (4) of this section.

to the fraudulent and intentional conversion of Goldsmith's interest in the insurance proceeds per the fraudulent endorsement on the insurance check.[5]

Upon passage of KRS 411.182 by the Kentucky General Assembly, joint and several liability in Kentucky for tort claims was effectively abolished:

> [L]iability among joint tortfeasors in negligence cases is no longer joint and several, but is several only; and because the liability is several as to each joint tortfeasor, it is necessary to apportion a specific share of the total liability to each of them, whether joined in the original complaint or by third-party complaint, and the several liability of each joint tortfeasor with respect to the judgment is limited by the extent of his/her fault.

Degener v. Hall Contracting Corp., 27 S.W.3d 775, 779 (Ky. 2000).

In a case tried without a jury under CR 52.01, the circuit court is tasked with making detailed findings of fact and conclusions of law. In this role, the circuit court acts as fact-finder and must assess the credibility of witnesses and the weight of evidence. CR 52.01; *Moore v. Asente*, 110 S.W.3d 336 (Ky. 2003). It was incumbent upon the circuit court to apportion fault between Troy and Tonya. While we certainly sympathize with the circuit court given the facts of this case, the court, nonetheless, cannot abdicate its duty by finding that the evidence is inconclusive as to the identity of the forger of the insurance check. Rather, the circuit court, as fact-finder, must weigh and assess the credibility of Troy and

[5] The complaint in this case, consisting of three numeric paragraphs, only asserts a conversion claim. No reference is made to a mortgage or promissory note.

Tonya's testimony. At trial, the testimony of Troy and Tonya was diametrically opposed as to the forgery of the check. As fact-finder, the circuit court must weigh the veracity of the respective testimony and must apportion fault between Troy and Tonya in accordance with KRS 411.182.[6] Under the law applicable to this case, a specific percentage of fault (or none) must be allocated to each tortfeasor.

In sum, we affirm the circuit court's granting of a judgment for liability in the amount of $12,033.48 in favor of Goldsmith and reverse and remand the circuit court's judgment that Troy and Tonya were jointly and severally liable for damages in the amount of $12,033.48. Upon remand, the circuit court shall apportion fault against Troy and Tonya in accordance with KRS 411.182 as to the conversion of the insurance check proceeds. Additionally, upon remand, the court shall not grant any contribution or indemnity claims between Troy or Tonya.

For the foregoing reasons, the Finding of Fact, Conclusions of Law, and Judgment of the Jefferson Circuit Court is affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion.

ALL CONCUR.

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[6] Had Goldsmith introduced a promissory note or mortgage in support of his claim, our result in this case might be different. Goldsmith did not plead in the alternative or prove at trial, a contract claim against the Hayes. KRS 411.182 does not apply to breach of contract cases. *Abbott v. Chesley*, 413 S.W.3d 589 (Ky. 2013). Similarly, there were no allegations that the Hayes engaged in a joint enterprise or joint adventure that resulted in Goldsmith's loss, for which joint and several liability could be assessed. *Id.* We also note that Goldsmith did not file an appellee brief in this case.

BRIEF FOR APPELLANT:

George R. Carter
Louisville, Kentucky

NO BRIEF FOR APPELLEES.