

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000003-MR

TIMOTHY WAYNE CRAWFORD

APPELLANT

v. APPEAL FROM KNOX CIRCUIT COURT
HONORABLE THOMAS L. JENSEN, JUDGE¹
ACTION NO. 14-CI-00245

MAGNUM HUNTER PRODUCTION, INC.

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON, MAZE, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Timothy Wayne Crawford appeals from an order of the Knox Circuit Court entered December 16, 2015, overruling Crawford's motion to vacate summary judgment entered November 13, 2015, in favor of appellee Magnum Hunter Production, Inc. (Magnum). Crawford argues that the death of his first attorney and the fraudulent inaction of his second attorney operated to deny him

¹ Judge Thomas L. Jensen presided over this case in its entirety. He retired on February 16, 2016, after the appeal was filed.

the right to effectively defend this action and the Knox Circuit Court erred in failing to so rule. He also maintains that genuine issues of material fact exist that preclude entry of summary judgment for Magnum. For the reasons stated below, we find no error and affirm the entry of summary judgment by the Knox Circuit Court.

On June 24, 2014, Magnum filed the instant action in Knox Circuit Court alleging that Crawford encroached and trespassed upon Magnum's gas leasehold and related easement rights resulting in damage to Magnum's natural gas production lines located thereon. The alleged encroachment occurred during a logging operation Crawford was conducting on land owned by his wife. The complaint set out claims for compensatory and punitive damages for the loss of natural gas production, road repair, damage to natural gas lines and equipment and the cost of relocating those lines. Contemporaneously with the complaint, Magnum was granted a restraining order against Crawford to protect against further damage. The matter proceeded in circuit court, whereupon discovery was undertaken by Magnum, a pretrial conference was conducted, and a jury trial was scheduled for September of 2015.

On May 7, 2015, Crawford's attorney, Hon. Warren N. Scoville, died. Approximately three months later, Magnum moved for a pretrial conference in part because Crawford remained without counsel of record. On August 12, 2015, the circuit court entered an order compelling Crawford to produce new counsel of

record within 20 days. That order was mailed to Crawford's home and office addresses. Crawford did not comply with the order.

Thereafter, Magnum filed an exhibit list and witness list pursuant to the pretrial order. Crawford, who remained without counsel of record, did not file an exhibit or witness list. Due in part to a failure of substitute counsel to file an appearance in this action, the trial was continued to November 2015 and then to January 2016.

On October 26, 2015, Magnum moved for summary judgment. In support of the motion, Magnum tendered two affidavits, a recitation of the factual record and the supportive case law. Crawford did not dispute his receipt of the motion and filed no response to the motion.

On November 13, 2015, the circuit court rendered a summary judgment in favor of Magnum which forms the basis of the instant appeal. The circuit court awarded Magnum permanent injunctive relief against Crawford, \$9,225.66 in compensatory damages and \$20,000.00 in punitive damages. In ruling in favor of Magnum, the circuit court noted that Crawford failed to have new counsel appear in the case as so ordered and did not respond to orders or appear for hearings after the death of Attorney Scoville in May 2015, including the hearing on the motion for summary judgment on November 6, 2015. We further note that during the seventeen months this case was active, Crawford took no discovery and otherwise failed to refute the arguments asserted in Magnum's motion for summary judgment.

Crawford then engaged Hon. James H. Wren who filed a notice of appearance on November 18, 2015. Attorney Wren filed a motion to vacate the summary judgment the following day. Crawford argued that he was defrauded by another attorney, Hon. Gary Napier, who Crawford believed had been handling his case after the death of Scoville in May of 2015. A hearing on the motion to vacate was conducted on December 4, 2015, where Crawford submitted billing records from the law office of Attorney Napier in hopes of demonstrating that Napier was serving as counsel after Scoville's death.

Upon considering the proof, the circuit court entered an order on December 16, 2015, denying Crawford's motion to vacate. In support of the order, the circuit court cited *Brozowski v. Johnson*, 179 S.W.3d 261 (Ky. App. 2005) for the proposition that relief from judgment pursuant to Kentucky Rules of Civil Procedure (CR) 60.02 should be granted only in extraordinary circumstances, and that the negligence of an attorney is imputed to the client and is not grounds for relief. The circuit court also determined that Crawford's claim of fraud arising from Attorney Napier's alleged inaction failed to set out the necessary allegations with particularity, and instead made only general allegations which the circuit court could not consider. The court held that Crawford's remedy, if any, was against Napier and not through a motion to vacate summary judgment. This appeal followed.

We begin our analysis by addressing the appropriate standard of review of an appeal of a circuit court's entry of summary judgment. Commonly

referred to as the “*Steelevest* standard” this Court thoroughly addressed the same in

Lewis v. B & R Corporation, 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.” 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 *Steelevest* 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*.

Id. at 436 (footnotes and citations omitted). Accordingly, the appellate court must view the record below in a light most favorable to the party opposing the motion for summary judgment and all doubts must be resolved in that party's favor.

Steelevest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476 (Ky. 1991).

Additionally, Crawford has asserted the circuit court erred in denying his CR 59.05 motion to vacate summary judgment which Crawford predicated as being analogous to setting aside a default judgment under CR 55.02, requiring

application of CR 60.02. A trial court's ruling on a CR 59.05 motion to alter, amend or vacate is reviewed under an abuse of discretion standard. *Hall v. Rowe*, 439 S.W.3d 183 (Ky. App. 2014). The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair or unsupported by sound legal principles. *Id.* Our review proceeds accordingly.

Crawford argues on appeal that the circuit court committed reversible error in denying his motion to vacate. Crawford's central claim of error - that he was improperly denied notice and an opportunity to be heard due to the death of Attorney Scoville and inaction of Attorney Napier - is forwarded in two arguments. Crawford first argues that Napier's alleged wrongful inaction demands that summary judgment be reversed so that Crawford might properly defend the action on remand. And second, Crawford argues that genuine issues of material fact exist which were sufficient to overcome Magnum's motion for summary judgment. In sum, Crawford seeks a reversal of the circuit court's summary judgment in favor of Magnum and for the case to be remanded for further proceedings.

As to the first argument, to wit, that Napier's wrongful inaction improperly deprived Crawford of his right to be heard and to defend against Magnum's civil claim, the circuit court determined that Napier's alleged fraud is imputed to Crawford and does not form a basis for reversing the judgment on appeal. This conclusion is supported by the record and the law. A panel of this Court in *Brozowski*, 179 S.W.3d 261, cited [*Vanhook v. Stanford-Lincoln County*](#).

Rescue Squad, Inc., 678 S.W.2d 797 (Ky. App. 1984), for the proposition that the negligence of an attorney is imputed to his client, which was followed by the circuit court in this case. We must agree with the circuit court that Crawford's remedy, if any, is against Napier and does not form a basis for reversing the summary judgment on appeal.² Moreover, Crawford acknowledged in his motion to vacate summary judgment that "[t]he Defendant recognizes that he can be held accountable for the mistakes and omissions of his past attorneys" Thus, we find no error by the circuit court on this issue. Importantly, we also take notice that Crawford has failed to submit in the record below any affirmative evidence to establish that a genuine issue of fact exists to warrant a trial and preclude entry of summary judgment. Magnum's attorney, in complying with pretrial orders and preparing for a trial, does not "imply" as a matter of law that the case was not appropriate for summary judgment as argued by Crawford. That decision rests at all times with the trial judge in conformity with CR 56 and the *Steelvest* guidelines.

Crawford also argues that the circuit court abused its discretion in failing to sustain his motion to vacate the summary judgment on the issues of liability, compensatory damages and punitive damages. He maintains that Magnum's alleged failure to serve Napier with the pleadings after the death of Attorney Scoville constituted irregularities in the proceedings under CR 59.01(a) sufficient to warrant vacating the summary judgment. Crawford posits that the summary judgment imposed excessive damages in disregard of the evidence (CR

² This Court takes no position nor does this Opinion address the merits of any claim against attorney Gary Napier.

59.01(d) and (e)), which also justifies vacating the judgment. In essence, the focus of his argument is that the circuit court was “unfair in refusing to allow Tim [Crawford] to defend this lawsuit with competent counsel,” and that the summary judgment was arbitrary, unreasonable, unfair and unsupported by sound legal principles. Again, we disagree based on our review of the record below.

Due in part to the unfortunate and unusual fact pattern preceding the entry of summary judgment, and in part because this case is both an appeal from summary judgment and an appeal from the denial of a motion to vacate, a brief recitation of the judgment history is in order. The circuit court rendered summary judgment in favor of Magnum on November 13, 2015, and Crawford, through counsel, timely filed a motion to vacate summary judgment approximately four days later. At paragraph 4 of the motion to vacate summary judgment and as noted above, Crawford acknowledged “that he can be held accountable for the mistakes and omissions of his past attorneys, *and that his former attorneys’ behavior justifies the Court’s entry of Summary Judgment.*” (Emphasis added). He went on to state “that even if the Court is unwilling to vacate the judgment on the issue of liability, the Court at least vacate that portion of the judgment regarding damages.” And at paragraph 6 of the motion to vacate, Crawford stated that:

This Summary Judgment results basically from a default and failure to defend by the defendant. But even under CR 55.01 (the default judgment rule), if the defendant shows good cause, the defendant is entitled under CR 55.02 to have the default judgment set aside.

Thus, Crawford's motion to vacate: 1) acknowledged that the entry of summary judgment was justified; 2) sought to vacate the summary judgment as to damages; and 3) argued that the summary judgment should be treated as a default judgment for purposes of appeal.

Complicating matters even more in our consideration of these issues as concerns the motion to vacate, the circuit court cited to CR 60.02 (relief based upon grounds for mistake, inadvertence, excusable neglect, newly discovered evidence, fraud, etc...) which is proper in addressing a default judgment under CR 55.02. And, as Crawford notes in his brief, this was the argument presented to the circuit court at the hearing on the motion to vacate summary judgment on December 4, 2015. The circuit court, upon acknowledging that Crawford's motion to vacate alleged a deprivation of counsel through fraud, determined that Crawford "failed to set out the allegations with particularity and instead has made only general allegations of which the Court cannot consider." Finally, the circuit court applied the *Steelvest* standard to conclude that there were no genuine issues as to any material fact and that Magnum was entitled to a judgment as a matter of law.

Having closely examined the record and the law, we cannot conclude that the circuit court's denial of Crawford's motion to vacate summary judgment constituted an abuse of discretion. It is uncontroverted that Magnum tendered proof of actual damages arising from Crawford's acknowledged conduct, and that Crawford did not engage counsel of record as ordered by the circuit court or otherwise defend the action after Attorney Scoville's death. Crawford expressly

acknowledged in the motion to vacate that he is accountable for the mistakes and omissions of his past attorneys, and that the entry of summary judgment was justified. Summary judgment was proper under the “no genuine issue” test of *Steevest* - as Crawford’s motion to vacate so acknowledges - and we find no abuse of discretion in the denial of the motion to vacate. We may affirm the trial court for any reason supported by the record. [*King v. Com.*](#), 384 S.W.3d 193 (Ky. App. 2012). Thus, when the record is viewed in its totality, we find no error in the denial of the motion to vacate nor the granting of summary judgment in favor of Magnum.

Finally, we address the award of punitive damages by the circuit court under KRS 411.186.³ Crawford asserts that punitive damages are not supported by the record. Because the record reflects: 1) evidence that Crawford intentionally damaged the gas lines at issue; 2) that Crawford presented no proof to the contrary or to rebut said evidence after the death of Attorney Scoville; and 3) the circuit court, as fact finder, stated that it considered “all necessary factors” required by

³ Kentucky Revised Statutes 411.186(2) states:

If the trier of fact determines that punitive damages should be awarded, the trier of fact shall then assess the sum of punitive damages. In determining the amount of punitive damages to be assessed, the trier of fact should consider the following factors:

- (a) The likelihood at the relevant time that serious harm would arise from the defendant's misconduct;
- (b) The degree of the defendant's awareness of that likelihood;
- (c) The profitability of the misconduct to the defendant;
- (d) The duration of the misconduct and any concealment of it by the defendant; and
- (e) Any actions by the defendant to remedy the misconduct once it became known to the defendant.

law in reaching the punitive damages award, there is no legal basis upon our review to conclude that the circuit court committed reversible error in awarding said damages.

For the foregoing reasons, we affirm the Knox Circuit Court's order overruling defendant's motion to vacate summary judgment.

ALL CONCUR.

BRIEFS FOR APPELLANT:

James H. Wren, II
Williamsburg, Kentucky

BRIEF FOR APPELLEE:

Scott M. Webster
London, Kentucky