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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000926-MR

LOUIS COBOS — APPELLANT

v.

APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE KAREN LYNN WILSON, JUDGE
ACTION NO. 16-CI-00337

HOSEA R. SMITH AND
KENTUCKY FARM BUREAU
INSURANCE COMPANY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, GOODWINE, AND KRAMER, JUDGES

ACREE, JUDGE: Louis Cobos filed suit against Hosea R. Smith and Kentucky Farm Bureau Insurance Company ("Kentucky Farm Bureau") to recover damages resulting from a motor vehicle accident involving the truck he was driving and an

abandoned excavator owned by Smith. Cobos seeks review of the Henderson Circuit Court's summary judgment. After careful review, we affirm.

BACKGROUND

On the morning of May 7, 2015, Cobos was driving to work before sunrise in Henderson County. He testified he drove on Highway 266, when he turned left on Dr. Floyd Road, which was his usual route. As he continued his drive, Cobos struck a John Deere excavator that was parked across the road.

Cobos testified the weather was fair, his bright lights were on, and there were no distractions during his drive other than the deer he saw near Highway 266. Cobos stated he tried to brake, but he did not and could not see the excavator until it was too late.

Cobos called 911. The Henderson County Sheriff's Office responded. Several other people arrived at the scene, including Smith, the owner of the excavator. Smith testified he did not park the excavator in the middle of the road, and someone must have stolen it. Prior to the accident, Smith kept the excavator parked on his property about two hundred feet from the road with the key hidden in a compartment inside the cab.

Cobos filed suit against Smith and his insurer, Kentucky Farm Bureau, to recover damages for the injuries he sustained in the accident. After Smith and Cobos were deposed, Smith moved for summary judgment. Smith

argued he did not owe Cobos a duty of care. He argued alternatively that if he did owe Cobos a duty, the proximate cause of the injuries was not Smith's breach; rather, the injuries were caused by a superseding event.

Responding to Smith's motion, Cobos argued Smith, or someone who worked for him, could have abandoned the excavator in the road instead of an unknown thief. However, Cobos admitted in his deposition no one knew how the excavator ended up in the road, and he did not believe Smith committed this act. Cobos argued in the alternative that if Smith's theory of an unknown thief abandoning the excavator was correct, Smith was negligent still because hiding the key proves the risk of theft was foreseeable to him.

Based on the facts as developed through the parties' deposition testimony, the circuit court granted summary judgment in favor of Smith and Kentucky Farm Bureau. Despite Cobos's argument to the contrary, the circuit court found no issue of material fact because Cobos admitted he did not believe Smith abandoned the excavator in the road. Additionally, the circuit court found the act of the unknown driver was a superseding cause of Cobos's injury, which relieved Smith of liability. This appeal followed.

STANDARD OF REVIEW

When a trial court grants a motion for summary judgment, the standard of review on appeal 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." *Blackstone Mining Co. v. Travelers Ins. Co.*, 351 S.W.3d 193, 198 (Ky. 2010) (quoting *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996); citing CR[1] 56.03). "The record must be viewed 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, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991).

> 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* 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*.

[1] Kentucky Rules of Civil Procedure.

Lewis v. B & R Corporation, 56 S.W.3d 432, 436 (Ky. App. 2001) (citations and internal quotation marks omitted).

ANALYSIS

The circuit court first concluded Cobos had not created a genuine issue regarding two material facts: (1) the excavator was stolen from Smith's land; and (2) the unidentified thief left the vehicle in the middle of the road. Cobos does not contest those material facts.

Applying the law of superseding cause as expressed in *Bruck v. Thompson*, 131 S.W.3d 764 (Ky. App. 2004) to those uncontested material facts, the circuit court then concluded the thief's act of leaving the excavator in the middle of the road constituted a superseding cause that relieved Smith of liability. On that basis, the court entered summary judgment. We affirm.

In effect, Cobos argues that Smith owed him a duty not to facilitate the theft of the excavator by leaving a key, albeit hidden, in the vehicle. If, for argument sake only, this Court agrees with Cobos that Smith owed him a duty not to leave the key where he did, it will not affect the superseding cause analysis. The event the circuit court held superseded Smith's presumed negligence of facilitating the theft was not the theft itself; the superseding event was the thief's abandonment of the vehicle on the road.

In his brief to this Court, Cobos conjectures that Smith or someone who worked for him might have abandoned the excavator in the road, yet he conceded in his deposition that no one knew how the excavator got there and he did not believe Smith committed the act. This is no more than speculative argument of counsel and "arguments of counsel are not evidence." *Miller v. Commonwealth*, 283 S.W.3d 690, 695 (Ky. 2009). When reviewing summary judgment, this Court relies on the facts "found in the deposition testimony in this record and used by the circuit judge in [her] determination of summary judgment." *City of Florence, Kentucky v. Chipman*, 38 S.W.3d 387, 391 (Ky. 2001). This Court concludes, as did the circuit court – there is no genuine issue regarding the facts that are material to application of the law of superseding cause. Therefore, we examine only the circuit court's application of the law.

Cobos centers his argument on the concept of foreseeability, urging this Court to hold that foreseeability is a material fact question, or mixed question of law and fact, that must be decided by a jury. Generally, we agree. *Howard v. Spradlin*, 562 S.W.3d 281, 287 (Ky. App. 2018); *Shelton v. Kentucky Easter Seals Soc'y, Inc.*, 413 S.W.3d 901, 916 (Ky. 2013). However, Cobos's argument is too narrow and fails to account for the interplay between the concepts of foreseeability and superseding cause.

As stated in *Bruck v. Thompson*, the opinion cited by the circuit court:

> Even if we assume, however, that Thompson breached his duty of care and that it was foreseeable that his truck would be stolen, the thief's negligen[t driving] constituted a superseding cause of Bruck's injury. In Kentucky, a "superseding cause is an independent force" which breaks the chain of causation and relieves the original actor from liability. *NKC Hospitals, Inc. v. Anthony*, Ky. App., 849 S.W.2d 564, 568 (1993); *see also Deutsch v. Shein*, Ky., 597 S.W.2d 141 (1980); *Commonwealth Dep't of Highways v. Graham*, Ky., 410 S.W.2d 619, 620 (1966).

131 S.W.3d at 767-68. Applying the same rationale here, even if Smith could reasonably foresee that his excavator might be stolen, the thief's negligence in abandoning it in the middle of the road still constituted a superseding cause of Cobos's injuries.

The Supreme Court has more recently articulated the continued viability of the doctrine of superseding cause in *Patton v. Bickford*, in which the Court said:

> "[W]hether an undisputed act or circumstance was or was not a superseding cause is a legal issue for the court to resolve, and not a factual question for the jury." *House* [*v. Kellerman*], 519 S.W.2d [380] at 382 [(Ky. 1974)]. "By its nature, the question must be decided empirically, on a case-by-case basis, and cannot be practically fitted into instructions to juries." *Id.* . . .
>
> Courts apply the superseding intervening cause doctrine by determining whether the chain of causation applicable to a defendant's conduct has been broken by "facts [that] are legally sufficient to constitute an intervening cause." *Montgomery Elevator Company v. McCullough*, 676 S.W.2d 776, 780 (Ky. 1984). Facts

> sufficient to constitute a superseding intervening cause "are facts of such 'extraordinary rather than normal,' or 'highly extraordinary,' nature, unforeseeable in character, as to relieve the original wrongdoer of liability to the ultimate victim." *Id.* (quoting *House*, 519 S.W.2d at 382).

529 S.W.3d 717, 731 (Ky. 2016).

We conclude the thief's abandonment of the excavator in the middle of the roadway is an event that possesses all the attributes defined in *NKC Hospitals, Inc. v. Anthony* as constituting a superseding cause. Those factors are:

1) an act or event that intervenes between the original act and the injury;

2) the intervening act or event must be of independent origin, unassociated with the original act;

3) the intervening act or event must, itself, be capable of bringing about the injury;

4) the intervening act or event must not have been reasonably foreseeable by the original actor;

5) the intervening act or event involves the unforeseen negligence of a third party [one other than the first party original actor or the second party plaintiff] or the intervention of a natural force;

6) the original act must, in itself, be a substantial factor in causing the injury, not a remote cause. The original act must not merely create negligent condition or occasion; the distinction between a legal cause and a mere condition being foreseeability of injury.

849 S.W.2d at 568 (cited in *Pile v. City of Brandenburg*, 215 S.W.3d 36, 41-42 (Ky. 2006), *as corrected* (Mar. 22, 2007) (stating same factors with approval)).

CONCLUSION

For the foregoing reasons, we affirm the judgment of the Henderson Circuit Court.

ALL CONCUR.

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