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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001668-MR

MICHAEL CRITSER — APPELLANT

v.

APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE KAREN L. WILSON, JUDGE
ACTION NO. 16-CI-00034

JUDY CRITSER — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, JONES, AND L. THOMPSON, JUDGES.

JONES, JUDGE: The Appellant, Michael Critser, was injured when a vehicle driven by his wife, the Appellee, Judy Critser, hit a patch of ice, skidded, and stopped suddenly causing a collision with another vehicle. Michael filed a negligence action against Judy in the Henderson Circuit Court. Following discovery, the trial court found that it was undisputed that Judy was obeying all traffic laws at the time of the accident and that the icy patch was a sudden

emergency that Judy could not have avoided. On appeal, Michael argues that the trial court erred because whether the ice on the road constituted a sudden emergency is a factual determination that should have been decided by a jury after considering Judy's credibility and her perception of the road conditions. Having reviewed the record in conjunction with all applicable legal authority, we AFFIRM the trial court's summary judgment order in Judy's favor.

I. STATEMENT OF THE FACTS

The facts of this case are undisputed. On the morning of January 21, 2014, Michael asked Judy, his wife of over 40 years, to drive him to the doctor's office. With Judy driving and Michael in the front passenger seat, they left their home in Henderson, Kentucky, and headed westbound on Stadium Drive toward its intersection with Garden Mile Road, less than one mile from their home. While the sun was shining when the parties started their trip, there had been some snow and ice prior to their departure, and it was still cold outside. The road appeared wet from melted snow, but there was no ice visible.

Michael testified that Judy was driving "pretty slow" and "carefully," no more than ten to twelve miles an hour when approaching Garden Mile Road. The posted speed limit for the area was 30 miles per hour. As they neared the intersection, Judy applied the brake. Immediately, the vehicle slid on a patch of black ice, which neither Judy nor Michael had seen. As they were sliding into the

intersection, vehicles on Garden Mile Road were still approaching from both directions. Judy was able to turn the vehicle to the right, successfully avoiding a head-on collision with an oncoming vehicle traveling southbound on Garden Mile Road. However, a vehicle directly behind the Critsers' vehicle began to slip as well and rear-ended Michael and Judy.

Michael was injured in the collision; he filed a negligence action against Judy in Henderson Circuit Court on January 20, 2016.[1] The parties engaged in written discovery, and Judy deposed Michael in May of 2017. Approximately a month later, Judy filed a motion for summary judgment. She pointed out that Michael testified in his deposition that she was not driving negligently and that ice was a sudden emergency that she could not have avoided. The trial court noted that it generally agreed with Judy's legal premise regarding the ice being a sudden emergency but believed that summary judgment was premature because Michael had not yet taken Judy's deposition, and there was no evidence as to how Judy perceived or reacted to the conditions on the road. The trial court's order was entered on August 10, 2017.

Michael, however, did not make any effort to depose Judy or gather any additional discovery. On September 5, 2018, Judy renewed her motion for

[1] Michael also named State Farm Insurance Co., the insurance carrier at issue, as a defendant in his circuit court complaint. State Farm is not a party to this appeal.

summary judgment. She included her own affidavit with her motion. Therein, Judy averred that that she did not see the ice on the roadway and had been driving slowly and carefully when the vehicle began sliding. Michael responded to Judy's motion, arguing that there were still genuine issues of material fact that should be left to a jury, including Judy's credibility and whether there was a sudden emergency. The trial court first determined that the parties agreed that Judy was driving carefully and that she could not have seen the ice. Applying the sudden emergency doctrine to these undisputed facts, the trial court ordered summary judgment in Judy's favor.

This appeal followed.

II. STANDARD OF REVIEW

"[S]ummary judgment is to be cautiously applied and should not be used as a substitute for trial." *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 483 (Ky. 1991). A motion for summary judgment should only be granted "when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor" even when the evidence is viewed in the light most favorable to him. *Id.* at 482; *Shelton v. Kentucky Easter Seals Soc'y, Inc.*, 413 S.W.3d 901, 905 (Ky. 2013). To survive a properly supported summary judgment motion, the opposing party must present "at least some affirmative

evidence showing that there is a genuine issue of material fact for trial." *Steelvest*, 807 S.W.2d at 482.

Because there are no factual findings at issue, the Court reviews the trial court's decision *de novo*. *Shelton*, 413 S.W.3d at 905; *Barnette v. Hosp. of Louisa, Inc.*, 64 S.W.3d 828, 829 (Ky. App. 2002). On appeal, the record must be viewed in a light most favorable to the party who opposed the motion for summary judgment, and all doubts are to be resolved in his favor. *Malone v. Kentucky Farm Bureau Mut. Ins. Co.*, 287 S.W.3d 656, 658 (Ky. 2009).

III. ANALYSIS

The sudden emergency doctrine has long been a part of Kentucky's common law. Its origins date back to Kentucky's application of contributory negligence. When applied in conjunction with the principles of contributory negligence, the doctrine absolved one acting in the face of an emergency from liability even where the actions may have been unwise. *Lawson's Adm'r v. Brandenburg*, 240 Ky. 68, 41 S.W.2d 201, 203 (1931) ("Responsibility does not flow from an unwise act done in an emergency, which the party, alleged to have been negligent, did not create.").

After Kentucky's adoption of comparative negligence, the fate of the sudden emergency doctrine seemed uncertain. Trial courts faced with applying the doctrine in a comparative negligence setting were unsure whether or how to do so.

In *Henson v. Klein*, 319 S.W.3d 413 (Ky. 2010), the Kentucky Supreme Court held that the sudden emergency doctrine remained viable notwithstanding Kentucky's adoption of comparative negligence. The Court explained that the doctrine remained viable because it worked to define duty, not the allocation of fault. *Id.* at 422-23. "Because the sudden emergency doctrine relates only to the question of whether a duty was breached, and has no affect [sic] on the means by which damages are allocated, the shift to comparative negligence should not in any way alter our view about the necessity of a sudden emergency instruction." *Id.*

In *Regenstreif v. Phelps*, 142 S.W.3d 1 (Ky. 2004), our Supreme Court held that hitting a patch of ice is exactly the type of situation that gives rise to a sudden emergency instruction. Without the doctrine, the defendant's "failure to adhere to the duties enumerated by statute (e.g., to keep her automobile on the right hand side of the road) [would] . . . result in liability even if the defendant was not at fault." *Id.* at 6. Thus, Judy is correct that ice *can* be a situation where the sudden emergency doctrine is applicable. However, it is not so much the ice itself that creates the sudden emergency as the vehicle slipping on it. If the driver was operating the vehicle in a negligent manner so as to make it more likely that the car would slip, the doctrine does not apply.

In the face of an out-of-control vehicle, the driver must react quickly and choose between various alternatives, none of which may be ideal. The sudden emergency doctrine holds an individual who chooses one course instead of another to a lesser standard of care should the choice she made prove to be unwise. Interestingly enough, in this case, even Michael seems to suggest that Judy made the wisest possible decision in the face of her sliding vehicle. She avoided a head-on collision, but this caused her to be hit from behind. Rather than a case about how Judy reacted in the face of an emergency situation, this case is actually more about whether Judy's driving created the emergency, *i.e.*, whether her driving was appropriate for the roadway conditions that morning.

The trial court reviewed the record and determined that Michael failed to offer any evidence that Judy was driving negligently when she hit the patch of ice and spun out of control. We agree. Both parties testified that Judy was driving slowly, cautiously, and attentively.[2] Michael failed to produce any affirmative evidence that Judy acted negligently. *Blackstone Mining Company v. Travelers Insurance Company*, 351 S.W.3d 193, 201 (Ky. 2010) (citation omitted)

[2] Michael argues that questions remain relating to the credibility of witnesses and the weight of the evidence at trial. He contends that the jury must still decide for itself whether Judy is believable in her testimony. However, those questions are not material ones, as they do not relate to the controlling facts of the case. *See James Graham Brown Found., Inc. v. St. Paul Fire & Marine Ins. Co.*, 814 S.W.2d 273, 277 (Ky. 1991). Questions of credibility and weight are key when parties are in dispute over some material fact. However, the parties do not dispute any material fact, and so summary judgment is appropriate.

("[S]ummary judgment is nevertheless appropriate in cases where the nonmoving party relies on little more than 'speculation and supposition' to support his claims."). All the evidence points to the same conclusion: "[g]iven the icy road conditions, the accident was unavoidable." *Gibbs v. Wickersham,* 133 S.W.3d 494, 497 (Ky. App. 2004) (holding there was no jury issue where the proof established that the defendant's driving adhered to all the duties imposed on him by law).

Michael further contends that the trial court should not have relied upon Judy's self-serving affidavit in rendering summary judgment. This is clearly incorrect. The Kentucky Rules of Civil Procedure allow for consideration of self-serving affidavits in summary judgment so long as they are based on the affiant's personal knowledge. *Hill v. Fiscal Court of Warren Cty.*, 429 S.W.2d 419, 423 (Ky. 1968). CR[3] 56.05, which governs summary judgment, expressly provides:

> Supporting and opposing affidavits shall be made on personal knowledge [and] shall set forth such facts as would be admissible in evidence. . . . The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

CR 56.05.

Admittedly, affidavits are the "least satisfactory form of evidentiary materials on which to base a summary judgment"; nevertheless, it is well-settled that summary judgment may be adjudicated on affidavits alone or in addition to

[3] Kentucky Rule of Civil Procedure.

other evidence. *Hill*, 429 S.W.2d at 422 (quoting *Smith v. Hilliard*, 408 S.W.2d 440, 442 (Ky. 1966)). If "uncontroverted affidavits fairly disclosing the facts show that a genuine issue does not exist," the opposing party must produce at least some evidence that amounts to more than mere allegations in order to survive summary judgment. *Id.* at 423 (citation omitted). Moreover, we would be remiss if we did not note that Michael was given the opportunity to depose Judy but did not do so for a year. Given his failure to test Judy's statements by deposition, we give no credence to his arguments that her affidavit should have been tested in some manner.

The evidence is in agreement. Judy was driving carefully, and the accident was caused when the car slid on black ice and Judy had to make a choice regarding how to respond. Even when viewing the record in the manner most favorable to Michael, we cannot say that he presented any evidence warranting a judgment in his favor. We hold that the trial court correctly determined that summary judgment was appropriate due to the lack of any genuine material issue of fact.

IV. CONCLUSION

In light of the foregoing, we AFFIRM the trial court's judgment.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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