

RENDERED: SEPTEMBER 9, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

**Commonwealth of Kentucky
Court of Appeals**

NO. 2010-CA-000069-MR

BILLY ANDREW, JR.

APPELLANT

v. APPEAL FROM ADAIR CIRCUIT COURT

HONORABLE JAMES G. WEDDLE, JUDGE

ACTION NO. 08-CI-00023

COY TURNER, JR. AND
M & W MILLING COMPANY, INC.

APPELLEES

OPINION
REVERSING
AND REMANDING

*** * * * *

BEFORE: CAPERTON AND THOMPSON, JUDGES; LAMBERT,¹ SENIOR JUDGE.

THOMPSON, JUDGE: Billy Andrew, Jr. appeals the Adair Circuit Court's judgment on the pleadings against him arising out of a vehicle collision wherein he pursued a claim for property damage and lost business income. We reverse.

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

On April 16, 2007, after delivering feed to a farm, Coy Turner, Jr. was driving back to his workplace at M & W Milling when a movable auger on his truck dislodged, swung into oncoming traffic, and struck a dump truck owned by Andrew. As a result of the incident, Andrew's truck was damaged. On January 25, 2008, Andrew filed an action alleging a claim for negligence against Turner and a claim for vicarious liability against M & W Milling. His claim was based on damage to his dump truck and for loss of income due to the loss of the truck.

On March 17, 2008, the defendants sent Andrew interrogatories and requests for production of documents. Two months later, the defendants filed a motion to compel discovery against Andrew. In September 2009, the defendants filed a second motion to compel discovery against Andrew. This motion stated that Andrew had failed to produce tax records for the last five years as requested, all financial documents and calculations related to the truck involved in the crash, and all documents showing customers during 2005, 2006, and 2007. The trial court then issued an order granting the defendants' motion and requiring Andrew to produce the requested documents.

Subsequently, the defendants cancelled the agreed inspection date of Andrew's business records and no records were viewed at that time. The defendants then filed a motion to dismiss citing Andrew's failure to comply with their discovery requests and the trial court's compliance order. They argued that Andrew failed to produce evidence regarding the value of his lost income and property damages. They further quoted from Andrew's deposition where he

testified that he had no idea regarding the proper amount of his monetary damages. No ruling appears to have been made on the defendants' motion.

On November 18, 2009, the defendants filed a motion in limine to exclude all evidence of Andrew's lost business income. They argued that Andrew failed to comply with the trial court's discovery order and produced no tax or business records covering the relevant time period. They further argued that Billy Andrew, Jr. Trucking, LLC., not Andrew individually, was the real party in interest and was required to bring this action. The defendants argued that Andrew could not individually pursue a lost business income claim because he was not the real party in interest. Thus, they argued Andrew improperly filed a suit in his individual capacity.

The defendants further moved for a motion in limine to exclude evidence regarding Andrew's property damage claim. They contended that Andrew did not comply with the trial court's discovery order and did not produce any documentation regarding the monetary damages to his truck and, thus, could not introduce evidence at trial regarding his property damage.

On November 25, 2009, the trial court issued an order granting the defendants' motion in limine excluding the introduction of Andrew's evidence. The defendants then moved for a judgment on the pleadings. On December 2, 2009, the trial court issued an order granting the defendants' motion.

Andrew contends that the trial court erred by excluding his ability to present evidence regarding his claim for lost business income and dismissing his lost business income claim based on a judgment on the pleadings.

Kentucky Rules of Civil Procedure (CR) 12.03 provides that a party to an action may move for a judgment on the pleadings to expedite the termination of a controversy when the ultimate and controlling facts are not in dispute. *City of Pioneer Village v. Bullitt County ex rel. Bullitt Fiscal Court*, 104 S.W.3d 757, 759 (Ky. 2003). A judgment on the pleadings provides an avenue for disposing of a case where the allegations of the pleadings are admitted and only a question of law remains. *Id.* When moving for judgment on the pleadings, a party must admit for the purposes of his motion not only the truth of all his adversary's pleaded allegations of fact but also the falsity of all allegations which have been denied. *Id.* Finally, the judgment should be issued only if it appears beyond doubt that the nonmoving party cannot prove any set of facts that would entitle him to relief. *Id.*

In the instant case, the trial court granted the defendants' motion in limine and excluded Andrew's lost profits evidence based on the arguments in the defendants' motion. The defendants contended that Andrew's lost profits claim must be rejected because Andrew's trucking company "Billy Andrew, Jr. Trucking, LLC., " was the real party in interest, not Andrew individually. Thus, the trial court ruled that Andrew's action could not move forward.

When determining the real party in interest, a trial court must analyze the unique facts of each case to determine if a party has a substantial interest in an

action. *Plaza B.V. v. Stephens*, 913 S.W.2d 319, 322 (Ky. 1996). In this case, Andrew was the sole owner of his trucking company, he operated his business from his residence, and he purchased the truck in question as an individual. He is clearly a real party in interest who could bring the action to recover damages. *Id.*

Based on the arguments contained in the defendants' motion, the trial court further found that Andrew failed to comply with its discovery order and that his evidence was insufficient to support his claim. However, the defendants' motion failed to acknowledge that they, in fact, cancelled a scheduled vehicle inspection at Andrew's residence where he maintained his business records. By cancelling the vehicle inspection, the defendants did not utilize the opportunity to inspect Andrew's business records as agreed.

While the trial court did order Andrew to produce the requested records one day before the vehicle inspection, the defendants unilaterally cancelled the inspection that would have permitted them to inspect the records. Under the circumstances, including the defendants' own actions and the lack of prejudice resulting from Andrew's actions, sanctioning Andrew by excluding his ability to offer evidence on the issue of lost profits simply bears no reasonable relationship to his minor noncompliance. *R.T. Vanderbilt Co., Inc. v. Franklin*, 290 S.W.3d 654, 662 (Ky.App. 2009).

Additionally, we conclude that Andrew's evidentiary offering was sufficient to defeat a motion for a judgment on the pleadings or for summary judgment. Like a motion for a judgment on the pleadings, a motion for summary

judgment, which requires an analysis of matters outside of the pleadings, permits a court to decide a case if there are no genuine issues as to any material fact and the moving party is entitled to a judgment as a matter of law. *Barnette v. Hospital of Louisa, Inc.*, 64 S.W.3d 828, 829 (Ky.App. 2002). A trial court can grant a summary judgment only if the facts as alleged, taken in a light most favorable to the nonmovant, establish that only an issue of law remains in dispute. *Archer v. Citizens Fidelity Bank & Trust Company*, 365 S.W.2d 727, 729 (Ky. 1963).

Andrew made a sufficient showing of facts in his pretrial discovery disclosures to make his allegation for lost profits a genuine issue of material fact. On October 15, 2009, over a month before the trial court's order excluding his evidence of lost profits, Andrew filed his witness and exhibit list, stating that he and Tamara Lynn Andrew, his wife, would testify regarding Andrew's lost profits resulting from the dump truck wreck. The filing provided that Andrew intended to introduce all of his business records regarding the income derived from the dump truck in question.

Although the defendants contend that Andrew did not assert a set of facts creating a genuine issue of material fact regarding his lost profits, Andrew's evidence was sufficient to permit his case to be presented to a jury. It is not appropriate to terminate a case where a party can bring forth facts which might entitle him to a jury verdict in his favor. *Laurel Const. Co., Inc. v. Paintsville Utility Comm'n*, 336 S.W.3d 903, 906 (Ky.App. 2010). Andrew was entitled to prevent his evidence to a jury, but the defendants would be entitled to a directed

verdict if Andrew did not sufficiently prove his claim. *Woods v. Western Kentucky University*, 303 S.W.3d 484 (Ky.App. 2009). The proper decision was to permit Andrew to present his case rather than terminate it prematurely. *Paintsville Utility Comm'n*, 336 S.W.3d at 906. If his evidence is found insufficient, the defendants can obtain relief pursuant to a motion for directed verdict.

Andrew contends that the trial court erred by excluding his ability to present evidence regarding his claim for property damage and dismissing his claim based on a judgment on the pleadings. He contends that he was qualified to testify regarding the damages to his dump truck. Thus, he contends that it was improper for the trial court to find that he had no competent evidence and preclude him from introducing any evidence on the matter.

Under KRE² 702, testimony and evidence requiring “scientific, technical, or other specialized knowledge” may be admitted by expert witnesses. Specifically, KRE 702 provides the following:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if:

- (1) The testimony is based upon sufficient facts or data;
- (2) The testimony is the product of reliable principles and methods; and
- (3) The witness has applied the principles and methods reliably to the facts of the case.

² Kentucky Rules of Evidence (KRE).

On appellate review, it has long been recognized that it is within the trial court's discretion to decide the qualifications of witnesses to testify. *Lee v. Butler*, 605 S.W.2d 20, 21 (Ky.App. 1979). The abuse of discretion standard requires that a trial court's decision be upheld if it is not arbitrary, unfair, or unsupported by sound legal principles. *Rice v. Rice*, 336 S.W.3d 66, 68 (Ky. 2011).

In his deposition, Andrew testified that he had been in the trucking business for twenty-one years, performed routine maintenance on his vehicles, and observed his damaged vehicle after the collision. Thus, he demonstrated that he may qualify as an expert on property damage to the dump truck. In his pretrial filing, Andrew listed himself as an expert to testify regarding the damages to his dump truck. Andrew's witness list also provided that he might call the defendants' witnesses, including Jeff Basham who the defendants stated was an expert on valuating property damage to vehicles.

Based on these pretrial disclosures, we conclude that Andrew demonstrated that he had evidence to show a genuine issue of material fact. It is the plaintiff's burden of proof to establish his claim by sufficient evidence. *Jones v. Hillview Civil Service Comm'n*, 813 S.W.2d 825, 827 (Ky.App. 1991). However, in the defendants' pretrial filing, they concede that Mr. Basham would testify that the repair of the dump truck would be \$22,820.41. Thus, by incorporating the defenses' witnesses in his list, Andrew established that the amount of damages to his property was not zero but was to be determined by the

evidence presented. Therefore, because Andrew produced sufficient evidence to put the issue of property damages in doubt, we conclude that the trial court erred by preventing him from offering expert testimony on damages. *Baltimore & O. R. Co. v. Carrier*, 426 S.W.2d 938, 941 (Ky. 1968). Accordingly, the judgment on the pleadings was premature and must be reversed.

For the foregoing reasons, the Adair Circuit Court's judgment on the pleadings regarding Andrew's two claims is reversed and remanded for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Danny Butler
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BRIEF FOR APPELLEE:

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