RENDERED: DECEMBER 22, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001731-MR

WILLIAM G. THOMAS — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 03-CI-009569

RAYMOND K. MILLER;
AND JAMES MILLER — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JOHNSON AND TAYLOR, JUDGES; HUDDLESTON,[1] SENIOR JUDGE.

JOHNSON, JUDGE: William Thomas has appealed from an order entered on July 18, 2005, by the Jefferson Circuit Court granting summary judgment[2] and dismissing his negligence claims against Raymond Miller (Raymond) and James Miller (James). On appeal, Thomas does not contest the judgment entered in favor of Raymond, but contends that judgment in favor of James was not

[1] Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

[2] Kentucky Rules of Civil Procedure (CR) 56.

proper. Having concluded that the trial court did not err in granting summary judgment in favor of James, we affirm.

On June 20, 2003, between 10:30 p.m. and 11:00 p.m., James parked a 2000 Chrysler Concorde in the driveway of the home he shared with his father, Raymond, and unloaded groceries from the trunk. After removing the groceries, James apparently left the keys to the car's ignition in the car's trunk lock. James then went into the house and went to sleep. The car was owned by Raymond, but primarily used by James. James had put expensive wheels and tires on the car and had installed an expensive stereo system.

At some point between 11:00 p.m. and 6:47 a.m. the next morning, the car was stolen from James's driveway by an unidentified thief. At 6:47 a.m. on June 21, 2003, the car ran a red light on St. Catherine Street and collided with Thomas's vehicle. The driver of the Miller car fled the scene and has never been identified. James claims that when he woke up on June 21, 2003, he noticed for the first time that the vehicle was missing and then called the police and his father to report that the vehicle had been stolen.[3] Raymond testified in his deposition that no vehicles had ever been stolen from the residence prior to this occasion.

[3] According to James, the vehicle had been stolen on a prior occasion but from a different location. The car was recovered missing its wheels, its tires, and the stereo.

Thomas filed suit initially against Raymond as the owner of the vehicle. The suit was subsequently amended to assert claims against James for his alleged negligence leading to the car being stolen and for negligent entrustment. The trial court relied upon this Court's decision in Bruck v. Thompson,[4] in ruling that the negligent act of the unidentified thief was not foreseeable by the Millers and that the facts of the case did not constitute "special circumstances" to support imposing liability on James. This appeal followed.

Thomas contends the trial court erred in finding that the case does not present "special circumstances" to create a jury issue as to the alleged negligence of James. Additionally, Thomas contends that a jury issue exists on his claim that James negligently entrusted the vehicle to someone else, known to him, who caused the accident because the car was not "hot wired." Thomas contends, with no affirmative evidence in the record to support the contention, that a jury could reasonably believe that James's reporting the car stolen approximately four hours after the accident was to protect the permitted user and James from liability.

The standard of review governing an appeal of a summary judgment is well-settled. We must determine whether the trial court erred in concluding that there was no genuine issue

[4] 131 S.W.3d 764 (Ky.App. 2004).

as to any material fact and that the moving party was entitled to a judgment as a matter of law.[5] Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[6] In Paintsville Hospital Co. v. Rose,[7] the Supreme Court of Kentucky held that for summary judgment to be proper the movant must show that the adverse party cannot prevail under any circumstances. The Court has also stated that "the proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor."[8] Summary judgment is also proper where, under undisputed facts, the moving party owed no duty to the non-moving party, or, as a matter of law, any breach of a duty owed was not the proximate cause of the non-moving party's injury.[9] There is no requirement that the appellate court defer to the trial court since factual findings

[5] Scifres v. Kraft, Ky.App., 916 S.W.2d 779, 781 (1996).

[6] Kentucky Rules of Civil Procedure (CR) 56.03.

[7] Ky., 683 S.W.2d 255, 256 (1985).

[8] Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991).

[9] Pathways, Inc. v. Hammons, 113 S.W.3d 85, 89 (Ky. 2003).

are not at issue.[10] "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."[11] Furthermore, "a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial."[12]

We conclude that this Court's recent decision in Bruck is directly on point and dispositive of this matter. In Bruck, a pedestrian was struck while crossing a street by a truck that had been stolen from the defendant's driveway. Prior to the truck being stolen, the defendant had been working on the vehicle. The defendant then left the residence in another vehicle for a period of time and left the truck unlocked with the ignition key on the floor board. There was also evidence that the defendant had had a car stolen from his property 30 years before the truck was stolen and that the home had been burglarized on at least two prior occasions.[13]

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[10] Goldsmith v. Allied Building Components, Inc., Ky., 833 S.W.2d 378, 381 (1992).

[11] Steelvest, 807 S.W.2d at 480 (citation omitted).

[12] Id. at 482. See also Philipps, Kentucky Practice, CR 56.03, p. 321 (5th ed. 1995).

[13] Bruck, 131 S.W.3d at 765-66.

This Court in Bruck held that because the truck was parked on a private driveway, KRS 189.430(3) was not applicable because "this statute is a 'part of the regulations of traffic on public ways[.]'"[14] Thus, this statute prohibits leaving a vehicle unattended without locking the ignition and removing the key on a public way, not in a private driveway. It further held that even assuming the defendant "breached his duty of care and that it was foreseeable that his truck would be stolen, the thief's negligence constituted a superceding cause of Bruck's injury."[15] Finally, this Court held that the fact that the defendant did not know his neighbors, lived in an urban neighborhood, and had occasionally been victimized by prior thefts did not constitute "special circumstances" to provide "sufficient notice that a theft was likely to occur."[16]

The facts of the case before us are indistinguishable from the facts of Bruck. James parked the vehicle in his driveway and left the keys to the vehicle in the trunk lock of the car. Even assuming this to be a breach of a duty, the thief's negligent operation of the vehicle was a superceding cause of Thomas's injuries. A superceding cause "breaks the

[14] Bruck, 131 S.W.3d at 767 (quoting Estridge v. Estridge, 333 S.W.2d 758, 760 (Ky. 1960)).

[15] Id. at 769.

[16] Id.

chain of causation and relieves the original actor from liability."[17] The fact that the vehicle had previously been stolen from a different location and that it had expensive wheels, tires, and stereo system likewise do not create "special circumstances" indicating that the theft of the vehicle was forseeable. The trial court properly granted summary judgment to James on this issue.

As for Thomas's claim that a jury issue exists as to whether James negligently entrusted the vehicle to another person, we note that Thomas does not cite any authority to support his contention nor does the record contain any affirmative evidence to counter James's affirmative statements that the car was stolen and that he did not give anyone permission to use the vehicle on June 21, 2003. A party opposing summary judgment must present some affirmative evidence demonstrating the presence of an issue of material fact.[18] Thomas has not offered any evidence to support his allegation that James may have reported the car stolen to protect himself or a permissive user from liability. Nor has Thomas offered any evidence to contradict James's affirmative statement that the car was stolen by an unknown thief other than to assert that the

[17] Bruck, 131 S.W.3d at 767 (citing NKC Hospitals, Inc. v. Anthony, 849 S.W.2d 564, 568 (Ky.App. 1993)).

[18] See Hubble v. Johnson, 841 S.W.2d 169, 171 (Ky. 1992); and Bucholz v. Dugan, 977 S.W.2d 24, 27 (Ky.App. 1998).

jury might not believe James. This is simply insufficient evidence to defeat James's motion for summary judgment.

Based upon the foregoing, the opinion and order of the Jefferson Circuit Court granting summary judgment is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANT:	BRIEF AND ORAL ARGUMENT FOR APPELLEE:
Grover S. Cox Louisville, Kentucky	Michael J. Darnell Louisville, Kentucky