RENDERED: MARCH 13, 2009; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002093-MR

MELVIN BANKS, EXECUTOR OF ESTATE
OF LUGENIA MURRELL BANKS — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 05-CI-05404

L.G. FOX, INC.;
FOX REAL ESTATE, LLC; AND
MARWAN RAYAN, FAYETTE COUNTY
ROAD ENGINEER — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ACREE, CLAYTON, AND KELLER, JUDGES.

ACREE, JUDGE: Melvin Banks, executor of the estate of Lugenia Murrell Banks (the Estate), appeals from the summary judgment granted in favor of L.G. Fox, Inc. (L.G. Fox); Fox Real Estate, LLC (Fox); and Marwan Rayan (Rayan), Fayette County Road Engineer, in both his official and individual capacities (collectively

referred to as Appellees). In granting the Appellees' motions for summary judgment and/or to dismiss, the Fayette Circuit Court found that the Estate could only offer speculative evidence as to causation. On appeal, the Estate argues that the evidence it offered was not simply speculative; that the circuit court misapplied caselaw in making its findings; and that the Appellees' violation of a statute and ordinances were the proximate cause of Banks' injuries. For the following reasons, we reverse and remand the case for further proceedings.

FACTS

The underlying facts are not in dispute. Fox owns and L.G. Fox occupies property (the Fox property) on the corner of Jaggie Fox Way and Sandersville Road in Lexington, Kentucky. Jaggie Fox Way is a secondary street that crosses Sandersville Road. A stop sign is located adjacent to the Fox property placed there to stop traffic on Jaggie Fox Way before it proceeds onto or across Sandersville Road. At the time of the accident there was not a stop sign on Sandersville Road at that intersection.

On August 4, 2005, Lugenia Murrell Banks (Banks) picked up some items from her daughter's boyfriend in the neighborhood of the subject intersection. She then drove down Jaggie Fox Way toward Sandersville Road. It went unrefuted that Banks was unfamiliar with the intersection. Evidence from the crash data recorder in Banks' vehicle established that she did not stop or slow down before driving into Sandersville Road. A truck, traveling approximately 35

miles per hour, struck Banks' vehicle. The truck driver was unable to avoid the collision and struck Banks' car on the driver's side. Banks died at the scene.

The Estate brought suit against Fox and L.G. Fox alleging that one or both negligently, and in violation of a Lexington Fayette Urban County Government (LFUCG) ordinance, permitted a "street tree" on the Fox property to block drivers' views of the stop sign. The Estate argued to the trial court, as it argues here, that this prevented Banks from seeing the stop sign and was, therefore, a substantial factor in causing the accident.

The Estate amended its complaint to add Rayan, road engineer for LFUCG, alleging that as county engineer he was responsible for making sure that the stop sign was visible. Following some discovery, the Appellees filed various motions to dismiss and for summary judgment. In relevant part, the Appellees argued that the Estate's claims were based on mere speculation as to the cause of the accident. The Appellees noted that the stop sign was only partially blocked by tree branches and that Banks could have run the stop sign for any number of other reasons. Additionally, Rayan argued that the statute in question does not apply to him, and L.G. Fox and Fox argued that the ordinances in question do not give rise to a private cause of action.

In opposition to the Appellees' motions, the Estate offered a number of affidavits and other documents.[1] In his affidavit, family friend Keith Smith

[1] We note that some of these documents were filed as attachments to the Estate's motion to vacate the court's order granting summary judgment and dismissing all parties. However, because of some procedural irregularities, the court treated the motion to vacate as the Estate's response to the motions to dismiss and/or for summary judgment. Because the Estate was

stated that he took a photograph of the stop sign on the day after the accident. That photograph shows that the stop sign is partially hidden by tree limbs. Deborah Griggs (Griggs) stated in her affidavit that she went through the same intersection the previous day and could not see the "stop sign because it was obscured by a street tree." Griggs also stated that she "proceeded directly into the intersection unaware that [she] had run the stop sign until" her son, who was a passenger, informed her of that fact. Sgt. Scott M. May and Officer Ricky Kendrick, two LFUCG police officers who investigated the accident, stated in their affidavits that "the obstructed view of the stop sign at Jaggie Fox Way by the street tree was a substantial contributing factor to this accident." Melvin Banks, the Estate's executor, stated in his affidavit that the street tree was approximately 18 ½ feet from the stop sign. The Estate argued that this tree's placement violated an ordinance requiring trees to be at least fifty feet from a stop sign.

As noted earlier in this opinion, the crash data recorder in Banks' vehicle indicated that Banks did not attempt to brake when entering the intersection. The Estate argued that all this evidence, taken together, provided a reasonable explanation as to why Banks did not yield to oncoming traffic.

After reviewing this evidence, the trial court granted summary judgment to all of the Appellees. In doing so, the court held in pertinent part, as follows:

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permitted to file the affidavits of record, the procedural irregularities had no bearing on the trial court's opinion and have no bearing on this Court's opinion. Therefore, we will not provide further details regarding those irregularities.

> The cause of the accident is undisputed: Ms. Banks failed to yield the right of way at the intersection, driving through a stop sign. At issue is why she failed to yield.
>
> Plaintiff's evidence . . . is that the "most likely cause" of Ms. Banks' failure to yield was a partially obstructed stop sign at the intersection. All defendants contend this evidence is pure speculation and that there are numerous other possible causes for her failure to yield. The Court agrees. Kentucky case law is clear that a jury may not be permitted to speculate when probabilities of an event's having happened in one of two or more ways are equal and there is no evidence as to which way it actually happened. *Fields v. Western Kentucky Gas Company*, Ky., 478 S.W.2d 20 (1972).
>
> We know that Ms. Banks' ran the stop sign. We don't know the circumstances surrounding why she ran the stop sign. We can only speculate. Plaintiff's evidence that the partially obstructed stop sign was "the most likely cause" of Banks' failure to yield furnishes a basis for nothing more than conjecture as to why she failed to yield causing this unfortunate accident. *See McKamey v. Louisville & Nashville Railroad Co.*, Ky., 271 S.W.2d 902 (1954). Accordingly, Plaintiff's claims against all defendants are hereby dismissed, with prejudice, with each party to bear their own costs.[2]

The Estate argues that the trial court erred when it found that the Estate's claims were based on mere speculation. For the reasons set forth below, we agree.

STANDARD OF REVIEW

"The standard of review on appeal of a summary judgment is whether the circuit judge correctly found that there were no issues as to any material fact and that the moving party was entitled to a judgment as a matter of law." *Pearson ex rel. Trent v. Nat'l Feeding Systems, Inc.*, 90 S.W.3d 46, 49 (Ky. 2002).

[2] The circuit court adopted by reference this language in its order denying the Estate's motion to vacate.

> This is a negligence case, which requires proof that (1) the defendant owed the plaintiff a duty of care, (2) the defendant breached the standard by which his or her duty is measured, and (3) consequent injury. *Mullins v. Commonwealth Life Insurance Co.,* Ky., 839 S.W.2d 245, 247 (1992), citing *Illinois Central R.R. v. Vincent,* Ky., 412 S.W.2d 874, 876 (1967). "Consequent injury" consists of what hornbooks separate into two distinct elements: actual injury or harm to the plaintiff *and* legal causation between the defendant's breach and the plaintiff's injury. *See Lewis v. B & R Corporation,* Ky.App., 56 S.W.3d 432, 436 (2001); David J. Leibson, Kentucky Practice, *Tort Law* § 10.2 (West Group 1995); William L. Prosser, *Law of Torts* (West 1976). Duty, the first element, presents a question of law. *Mullins,* 839 S.W.2d at 248. Breach and injury, are questions of fact for the jury to decide. *Lewis,* 56 S.W.3d at 438 (citing cases). The last element, legal causation, presents a mixed question of law and fact. *Deutsch v. Shein,* Ky., 597 S.W.2d 141, 145 (1980).

Pathways, Inc. v. Hammons, 113 S.W.3d 85, 88-9 (Ky. 2003).

ANALYSIS

> Appellant points out, and we believe correctly, that:
>
> The trial court did not decide the case upon, or even address the issue of the defendants' [Appellents'] respective "duties." Instead, the Fayette Circuit Court dismissed all of the appellant's claims solely on the issue of causation.

(Appellant's brief, p. 5). Obviously, if none of these defendants owed a duty to keep the stop sign free of visual obstruction, then causation need not become an issue and summary judgment would be proper. But causation, and not duty, was the basis of the ruling below.

The trial court focused on whether "the partially obstructed stop sign was 'the most likely cause' of Banks' failure to yield[.]" (Trial Court's June 26, 2007, Order). When examining causation, this is not the proper question. To be actionable, the obstruction need only have been a substantial factor in causing the accident, not its most likely cause. *Murphy v. Taxicabs of Louisville, Inc.*, 330 S.W.2d 395, 397 (Ky. 1959), quoting Prosser, The Law of Torts (2nd ed.), p.226 ("[T]wo or more causes [may] combine to produce such a single result, incapable of any logical division, each may be a substantial factor in bringing about a loss, and if so, each may be charged with all of it.") (Emphasis omitted.). If reasonable minds could differ as to whether the obstruction was a substantial factor contributing to this accident, then summary judgment should have been denied. *Claycomb v. Howard*, 493 S.W.2d 714, 718 (Ky. 1973).

Numerous witnesses in this case, including two police officers, all with knowledge of the relevant facts, expressed their reasonable opinions that the obstructed view of the stop sign in question was a substantial factor in causing this accident.[3] More significantly, considering the question of legal causation, contemporaneous photographs provided sufficient physical evidence from which a jury might conclude that the tree obscured the stop sign and, as a consequence, that

[3] We do not suggest a party may defeat a motion for summary judgment by lay opinion as to what was or was not a "substantial factor" – an ultimate fact reserved to the jury – even if in affidavit form. *See, Mercer v. Daoran Corp.*, 676 S.W.2d 580, 583 (Tex. 1984)("A legal conclusion in an affidavit is insufficient to raise an issue of fact in response to a motion for summary judgment[.]"). The facts contained in the affidavits, i.e., what the witnesses observed at the scene, are capable of supporting a reasonable jury's inference to the same effect. Such facts can defeat a summary judgment motion.

Banks did not see the stop sign warning her that she did not have the right-of-way. *See Town of Register v. Fortner*, 274 Ga.App. 586, 618 S.E.2d 26, 28-29 (Ga.App. 2005)("plaintiffs submitted evidence [that] defendants were aware that the overgrown shrubbery needed to be cut back to prevent interference with the line of sight [and] also submitted photographs . . . from which a jury might conclude that the shrubs obscured visibility."). Certainly, reasonable minds could differ on this issue, but that is precisely why summary judgment was improper here.

We do not agree that speculation alone supports the inference that Banks ran the stop sign because it was obstructed. There is physical evidence that the sign *was* obstructed. The jury is entitled to make a reasonable inference from that evidence. As they are supported by evidence, they are permissible inferences.

On the other hand, the Appellees' suggestion that other inferences are offsetting is without merit. Appellees argue that Banks may have run the stop sign because she was distracted by her radio or cellular telephone, or by putting on lipstick, or by thinking about her new business, but this *is* pure speculation – there is absolutely no evidence of any character to support any of these inferences. As such, they are impermissible inferences. They are not "competing" inferences.

The trial court's and Appellees' use of *Fields v. Western Kentucky Gas Co.*, 478 S.W.2d 20 (Ky. 1972), as a measure of these competing inferences is not justified in these circumstances. *Fields* holds that when an event could have happened in one of multiple ways, *and* when "there is *no evidence* as to which way

it did happen," then the court is justified in taking the case away from the jury.[4] *Fields* at 22 (emphasis supplied). *Fields* is an appropriate measure only when "there is no evidence" to support *any* of the competing theories of causation. That is not the case before us. Here, there is some evidence upon which the inference urged by Appellant may be based.

Neither is *McKamey v. Louisville & N. Ry. Co.*, 271 S.W.2d 902 (Ky. 1954), particularly helpful. First, the case falls in that unique class of tort law that evolved because of the frequent circumstance of finding a dead body near railroad tracks. *See* W. J. Dunn, *Finding Of Decedent's Body On Or Near Tracks As Creating Presumption Or Inference Of Railroad's Negligence, Or As Affecting Burden Of Proof Relating Thereto*, 40 A.L.R.2d 881 (1955 & Supp. 2008)(citing 38 Kentucky cases in which this occurred). Second, *McKamey* was decided principally upon the question of whether the accident site was a public crossing, and focused on whether the railroad company owed McKamey a duty.

> In our opinion the lower court properly held the evidence did not establish that the passway or old road was a

[4] *Fields* was before the predecessor Court of Appeals after the trial court granted a directed verdict in favor of the defendant. The Court of Appeals reversed. The entirety of the *Fields* quote setting forth the legal proposition cited in the majority opinion is as follows:

> Although a jury may not be permitted to speculate when the probabilities of an event's having happened in one of two or more ways are equal and there is no evidence as to which way it did happen, it is neither legal "speculation" nor "conjecture" when a jury finds as a fact that an event happened by reason of a particular cause when the evidence on behalf of a party, if believed, is sufficient to show that it is more likely than not that the event occurred as a result of the cause so found.

Fields at 22, citing *Miller v. Watts*, 436 S.W.2d 515 (Ky. 1969).

> public crossing. It follows that appellee was *relieved of the duty* to give warning and maintain a lookout as if the crossing were a public one.

McKamey at 903 (emphasis supplied). Finally, unlike the case before us, McKamey's estate did not allege that he was on the railroad track because a third party's negligence obstructed his view of a railroad crossing warning sign.

It is reasonable to presume that if this case could have been resolved in favor of the Appellees based on whether the Appellees owed Banks a duty, the trial court would have done so. Upon remand, it may be decided in just that way. As the case stands now, the Estate alleged Appellees owed a duty to prevent the stop sign from being obstructed by foliage. Clearly, genuine issues of material fact remain before that question may be resolved.

In summary, it is reasonable, based on the evidence, to infer that Banks proceeded in disregard of the stop sign because it was obstructed as a result of the negligence of one or more of the Appellees. That reasonable inference makes an issue, preclusive of summary judgment, of whether the failure to abate the visual obstruction was a substantial factor in causing the accident. *See Physicians Plus Ins. Corp. v. Midwest Mut. Ins. Co.*, 254 Wis.2d 77, 646 N.W.2d 777, 799-800 (Wis. 2002)(discussing causation in the context of abating the public nuisance of foliage obstructing view of stop sign).

For these reasons, the summary judgment in favor of the Appellees is reversed and this case is remanded for further proceedings not inconsistent with this opinion.

CLAYTON, JUDGE, CONCURS.

KELLER, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

KELLER, JUDGE, DISSENTING: After reviewing the record, I respectfully dissent.

The Appellees have argued throughout this case that the Estate can only offer speculative evidence to support its theory that Banks did not stop at the stop sign because she did not see it. The parties have cited a number of cases on both sides of this issue; however, as did the trial court, I believe *McKamey v. Louisville & Nashville Railroad Co.*, 271 S.W.2d 902 (Ky. 1954), to be the most instructive. In *McKamey*, William Robbins (Robbins) was found lying unconscious and dying along tracks owned by Louisville & Nashville Railroad Company (the Railroad). Robbins's estate argued that a train, negligently operated by the Railroad, struck Robbins while he was at a public crossing. Although no one witnessed the accident, the court found that Robbins had been killed by a train. However, the evidence did not establish which train struck Robbins or how Robbins got onto the tracks, where Robbins was on the tracks when he was struck, or why he was there. The Court noted Robbins:

> may have been sitting or lying asleep on the track at the time. He may have fallen between the cars of a moving train and was run over as he attempted to board it. He may have been riding on the train from which he fell and was fatally hurt when he tried to jump off it. We could speculate endlessly in this manner, and this only demonstrates how the evidence adduced in this case furnishes a basis for nothing more than conjecture as to the cause of the unfortunate accident.

McKamey v. Louisville & N. Ry. Co., 271 S.W.2d 902, 904 (Ky. 1954).

In *McKamey* it was clear that Robbins died because he was struck by a train while on the railroad tracks. However, it was not clear, and could not be established, how Robbins came to be on those tracks. In the present case, it is clear Banks died because she was struck by a truck after she failed to stop at the stop sign at Jaggie Fox Way. However, it is not clear, and the Estate cannot establish with anything more than speculative evidence, why Banks ran that stop sign. Just as Robbins's estate could not establish why he was on the railroad tracks, the Estate herein cannot establish why Banks was in that intersection. As noted by the Appellees, Banks may not have seen the stop sign. However, it is equally likely that she was distracted by her radio; that she was putting on makeup; that she had dropped something on the floor and was looking for it; that she was talking on a cell phone; or any other number of reasons that drivers are distracted. Because the Estate cannot establish that its theory of how the accident occurred is more likely than any other possible theory, the circuit court correctly granted summary judgment.

I recognize the Estate's argument that it is only required to put forth evidence that Banks' failure to stop was a substantial cause of the accident. However, as noted above, that must be balanced by the fact that the Estate must establish why Banks failed to stop with evidence that is more than speculative. In essence, the Estate has a two-step hurdle in proving causation: it must produce

evidence that is more than speculative and that evidence must establish the Estate's theory was a substantial cause of the accident. The Estate cannot skip the first step, putting forth evidence that is more than mere speculation. Because the Estate cannot overcome this first step, I would affirm the circuit court.

Finally, I recognize the irony and sadness in that, if Banks had survived and been able to testify that she did not see the stop sign, the result would have been different. The stop sign being run is a substantial factor in the cause of the accident that took Banks' life. However, the majority has now condoned the Estate's failure to prove, with other than mere speculation, why Banks ran the stop sign, a necessary element of her case. I believe that I am bound to follow precedent as I understand it. Rules of the Supreme Court (SCR) 1.030(8)(a).

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