

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2008-CA-000660-MR

SHAMEL WHITT

APPELLANT

v.

APPEAL FROM MORGAN CIRCUIT COURT  
HONORABLE REBECCA K. PHILLIPS, JUDGE  
ACTION NO. 05-CI-00125

BIZZACK, INC., AND  
JASON HENDERSON

APPELLEES

OPINION  
AFFIRMING

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BEFORE: CLAYTON, MOORE, AND STUMBO, JUDGES.

STUMBO, JUDGE: Shamel Whitt appeals the grant of a summary judgment in favor of Bizzack, Inc., on March 18, 2008. The court found there were no genuine issues of material fact with regard to the claim against Bizzack. Mr. Whitt argues that there are questions of fact that still need to be determined and summary judgment should not have been granted. Bizzack responds that summary judgment

was proper. We agree with Bizzack and the lower court and affirm the summary judgment.

On January 14, 2005, Mr. Whitt and Jason Henderson were involved in a two-car accident on Kentucky Route 1161 in Morgan County, Kentucky. Mr. Henderson lost control of his car, crossed the center line, and hit the vehicle driven by Mr. Whitt. There is evidence in the record that Mr. Henderson lost control of his car because he hit black ice on the road, but this is disputed by Mr. Whitt.

At the time of the accident, traffic had been detoured onto Route 1161 from Kentucky Route 7 due to road construction on Route 7 in progress by Bizzack. Usually this road remained open to traffic, but a mudslide had occurred at the construction site and blocked part of the road, necessitating the detour. At no time did Bizzack do any construction to Route 1161.

Mr. Whitt was severely injured in the accident and this suit followed. Mr. Whitt brought Bizzack into the suit claiming that the company was negligent in not taking proper measures to ensure the detour was safe for vehicles to travel.

Bizzack filed a motion for summary judgment on August 18, 2006, arguing that it could not be negligent in this case as it was not a cause of the accident being that it had never done any work on Route 1161. Additionally it argued that Route 1161 was a state road and therefore it was the responsibility of the state, that Bizzack did not create a dangerous condition on the road, and that there is no evidence that the accident was caused by a defect in the road. This summary judgment was granted, but later vacated to allow further discovery.

After more discovery was completed, Bizzack filed another motion for summary judgment on April 9, 2007. This motion was also granted and this appeal followed.

The standard of review on appeal of a summary judgment 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. Kentucky Rules of Civil Procedure (CR) 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.*, Ky., 807 S.W.2d 476, 480 (1991). Summary “judgment is only proper where the movant shows that the adverse party could not prevail under any circumstances.” *Steelvest*, 807 S.W.2d at 480, citing *Paintsville Hospital Co. v. Rose*, Ky., 683 S.W.2d 255 (1985). Consequently, summary judgment must be granted “[o]nly when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor . . . .” *Huddleston v. Hughes*, Ky. App., 843 S.W.2d 901, 903 (1992), citing *Steelvest*, *supra*[.]

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

Mr. Whitt argues that a question of fact remains as to whether Bizzack took proper measures to ensure that the detour was safe for vehicles to travel. Mr. Whitt claims Route 1161 was too narrow for traffic and that the road was in a hazardous condition in that the shoulder of the road was worn down.

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. “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.

*Pathways, Inc. v. Hammons*, 113 S.W.3d 85, 88 - 89 (Ky. 2003).

Here, there is no evidence that any action or inaction on the part of Bizzack caused the accident. Bizzack did not choose to set up the detour or choose the route traffic would travel. Both were chosen by the State Highway Department's resident engineer, Jay Watts. Also, there is evidence in the record that the accident was caused when Mr. Henderson hit black ice. Trooper Phillip Kidd, who responded to the accident scene, stated in his deposition that he physically viewed the ice. Additionally, even if there were no ice, there is no evidence that any defect in the road caused the accident. The evidence in the record clearly shows that either the accident was caused by black ice or Mr. Henderson's negligence.

Since Bizzack was not doing any work on Route 1161 and the road was a state road, it owed no duty to motorists using that road. Even if Bizzack owed some duty to travelers of Route 1161 to maintain the road and ensure the lack of defects, it would still not change our decision in this case. There is no evidence that any defect in the road caused the accident, it was either caused by an act of nature or Mr. Henderson's negligence. Neither Mr. Whitt nor Mr. Henderson stated in their depositions that any condition in the road, other than the ice, caused the accident. It appears that Mr. Whitt will be unable to produce any

evidence to show the accident was caused by defects in the road or Bizzack's actions.

Based on the foregoing reasons, we affirm the trial court's granting of summary judgment in favor of Bizzack, Inc.

ALL CONCUR.

BRIEF FOR APPELLANT:

Teddy L. Flynt  
Salyersville, Kentucky

BRIEF FOR APPELLEE,  
BIZZACK, INC.:

William H. Partin, Jr.  
Lexington, Kentucky

NO BRIEF WAS FILED FOR  
APPELLEE, JASON HENDERSON