

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-000889-MR

TIMOTHY WAYNE ALLEN, SR.
AND
FAYE ANNE TAYLOR

APPELLANTS

v. APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE THOMAS O. CASTLEN, JUDGE
ACTION NO. 07-CI-01326

BENJAMIN S. STALLINGS

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE AND MOORE, JUDGES; KNOPF,¹ SENIOR JUDGE.

MOORE, JUDGE: Timothy Wayne Allen, Sr., and Faye Anne Taylor appeal from the Daviess Circuit Court's order granting the motion for summary judgment filed by Benjamin Stalling. After a careful review of the record, we affirm.

¹ Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

FACTUAL AND PROCEDURAL BACKGROUND

The facts in this case are not in dispute. On May 22, 2007, Timothy Wayne Allen, Sr., and Faye Anne Taylor were traveling home heading east on Seventh Street when they came to a four-way stop sign at the corner of Seventh Street and Daviess Street in Owensboro, Kentucky. Allen was in his wheelchair with his dog on his lap, and Taylor was riding her bicycle to the right of him.

As Allen and Taylor were crossing the intersection, they observed Benjamin Stallings, who was driving north on Daviess Street, make a complete stop at the intersection. Stallings' was the only vehicle at the intersection. Allen and Taylor testified that Stallings was talking on a cellular telephone and looking at the floorboard of his car instead of the road when he struck the back tire of Taylor's bicycle. The impact caused Taylor to knock Allen's wheelchair over and dump the dog off his lap.

After the accident, Stallings drove about half a block and then stopped. He looked out his window to see what he had hit and then drove away. Stallings subsequently pleaded guilty to leaving the scene of an accident and paid a fine for the offense.

When a police officer arrived at the scene of the accident, Allen and Taylor gave him their accounts of the accident. Allen refused to go to the hospital in an ambulance because he did not want to leave his wheelchair. He chose to go home instead. Later that day, Allen and Taylor did go to the emergency room and waited about three hours. They left without being treated.

Three days later, Taylor went to see her primary care doctor, Jeremy L. Bradley, M.D. Taylor claims she “mangled” her knee on the asphalt and badly scraped her hands when her bicycle was hit. She also claims she suffered emotional distress from being hit and seeing Allen and his dog turned over. Her doctor did not prescribe any medications to her, but he did take x-rays. Taylor does not know the result of the x-rays.

Three months later, Taylor followed up with Dr. Bradley for her regular three month check-up and did not mention any knee problems. Ms. Taylor states she still has pain in her knee.

Allen claims that his leg “got busted up”; that he was bruised and scraped badly on the right side; and that his ribs were bruised. He states he was unable to get out of bed for three or four days after the accident. He also states that, three or four days after the accident, he went to see Dr. Bradley. Allen claims his legs were scraped up at that time. Dr. Bradley took x-rays. Allen testified in his deposition that his ribs have healed and that he has no lingering problems from the accident.

On August 28, 2007, Allen and Taylor filed the underlying personal injury action against Stallings. Throughout the course of the underlying litigation, including all pleadings, depositions, answers to interrogatories, and all other documents in the record, Allen and Taylor failed to: (1) include in their complaint a claim for losses arising from property damage; (2) itemize or claim any lost wages, or future impairment to earn money; (3) itemize any medical expenses

claimed as damages; (4) provide any evidence that would support an award of compensatory and/or punitive damages in their favor in the trial court; and (4) put forth any evidence to establish valid claims for pain and suffering and punitive damages in this matter.

On February 19, 2008, Stallings moved for summary judgment. Allen and Taylor's response to the motion included no affirmative evidence, by affidavit or otherwise, of the existence of any damages asserted in their complaint against Stallings. Consequently, the circuit court granted Stallings' motion.

STANDARD OF REVIEW

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.

Lewis v. B&R Corp., 56 S.W.3d 432, 436 (Ky. App. 2001). In other words, summary judgment should be granted if it appears impossible that the non-moving party will be able to produce evidence warranting a judgment in his favor.

Steevest, Inc. v. Scansteel Service Ctr., 807 S.W.2d 476, 482 (Ky. 1991). While the moving party bears the initial burden of showing that no genuine issue of material fact exists, the opposing party has the burden of presenting some affirmative evidence showing that there is a genuine issue of material fact. *City of Florence v. Chipman*, 38 S.W.3d 387, 390 (Ky. 2001). When there is a complete failure of proof concerning an essential element of the non-moving party's case, there can be no genuine issue of material fact and thus summary judgment must be granted. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

ANALYSIS

To recover under a claim of negligence in Kentucky, a plaintiff must establish that: (1) the defendant owed a duty of care to the plaintiff; (2) the defendant breached its duty; and (3) the breach proximately caused the plaintiff's damages. *Lee v. Farmer's Rural Elec. Co-op. Corp.*, 245 S.W.3d 209, 211-212 (Ky.App. 2007). The trial court ruled only on the element of damages. Having decided that Allen and Taylor did not establish this element with affirmative evidence, the court granted Stallings' motion for summary judgment without discussing the other elements.

As a matter of law, summary judgment in favor of Stallings was proper because Allen and Taylor failed throughout the underlying litigation to establish, through affirmative evidence, a basis for damages in their case. Moreover, Allen and Taylor were required to respond to Stallings' motion with some affirmative evidence of the damages prayed for in their complaint; rather than doing so, Allen and Taylor's response discussed the applicability of certain statutory limits and bars to the recovery of damages in personal injury cases,² and offered evidence of property damage not requested in their complaint or in any

² In general, KRS 304.39-060(2)(b) bars additional damages for pain, suffering, and mental anguish resulting from automobile-related injuries absent a showing of medical expenses exceeding \$1,000. Allen and Taylor argue that the \$1,000 bar does not apply to them, as KRS 304.39-060(2)(c) states that the \$1,000 bar does not apply to persons who "are not owners, operators, maintainers, or users of a motor vehicle." In their response to the motion for summary judgment, Taylor and Allen did not put forth any affirmative evidence that they are not owners, operators, maintainers or uses of a motor vehicle. Nonetheless, as Taylor and Allen have not otherwise offered evidence to defeat summary judgment regarding the element of damages, we decline to address the issues under KRS 304.39-060(2)(b).

pleading prior to their response. Thus, they have failed to present evidence necessary to defeat summary judgment.

We find it necessary to address the fact that discovery in this case lasted roughly six months. “[Summary judgment] is proper only after the party opposing the motion has been given ample opportunity to complete discovery and then fails to offer controverting evidence.” *Suter v. Mazyck*, 226 S.W.3d 837, 841 (Ky.App. 2007) (citing *Pendleton Brothers Vending, Inc. v. Commonwealth, Finance & Administration Cabinet*, 758 S.W.2d 24, 29 (Ky. 1988); *Hartford Insurance Group v. Citizens Fidelity Bank & Trust Co.*, 579 S.W.2d 628 (Ky.App.1979)). We review discovery issues under an abuse of discretion standard. An abuse of discretion occurs when a ‘trial judge’s decision is arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *See, e.g., Farmland Mutual Insurance Company v. Johnson*, 36 S.W.3d 368, 378 (Ky. 2000).

While arguably six months may be considered a brief period for discovery, we cannot say that under the facts of this matter the trial court’s decision to grant summary judgment without allowing further discovery after the motion for summary judgment was filed was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. We so find because the six-month period was more than sufficient for time for Allen and Taylor to obtain some affirmative evidence to defeat summary judgment, including the submission of any medical bills relating to this matter or, at the very least, an affidavit from Dr. Bradley substantiating their respective injuries. Allen and Taylor failed to make such an effort. Consequently,

they failed to adequately respond to Stallings' motion for summary judgment, and "the law does not favor those who are dilatory or indifferent." *Ard v. Haggard*, 253 S.W.2d 610 (Ky. 1952).

Allen and Taylor's inaction when confronted with a motion for summary judgment put them in the same situation as the appellant in *Swatzell v. Natural Resources and Environmental Protection Cabinet*, 996 S.W.2d 500, 505 (Ky. 1999), where the Court held that:

[t]he Cabinet's Amended Complaint alleged a continuing failure to abate and although Swatzell denied the allegation, he made no effort to respond to the summary judgment motion with an affidavit or other evidence of record reflecting work at the site since the Secretary's order. Swatzell waived his right to challenge the specific findings in that order when he failed to object and appeal. *Natural Resources & Environmental Protection Cabinet v. Coleman*, Ky.App., 876 S.W.2d 614 (1994). If Swatzell had undertaken some remedial measures since that time which would obviate the need for all of the measures previously specified he had the obligation to present affirmative evidence and not rest on his "mere allegations." *Smith v. Food Concepts, Inc.*, Ky.App., 758 S.W.2d 437 (1988) (noting that a party resisting summary judgment must "put up or shut up"). *See also Steelvast v. Scansteel Service Center*, Ky., 807 S.W.2d 476, 482 (1991) (party opposing summary judgment must present some "affirmative evidence" of a genuine issue of material fact). Consequently, we reject Swatzell's allegation that a material issue still exists....

Allen and Taylor likewise having failed to put forth some affirmative evidence, we affirm the circuit court's granting summary judgment in favor of Stallings.

ACREE, JUDGE CONCURS.

KNOPF, SENIOR JUDGE, CONCURS IN RESULT.

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