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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001646-MR

JAMIE R. BRANTLEY, ADMINISTRATRIX,
ESTATE OF GERALD RAY BUSCHKOETTER,
DEC. AND JAMIE R. BRANTLEY, GUARDIAN
AND NEXT FRIEND OF BRITT RENAE' BRANTLEY,
AN UNMARRIED MINOR — APPELLANTS

APPEAL FROM DAVIESS CIRCUIT COURT
v. HONORABLE JOSEPH W. CASTLEN III, JUDGE
ACTION NO. 06-CI-00153

LONNIE BELL AND BRETT COOMES — APPELLEES

AND NO. 2009-CA-001659-MR

LONNIE BELL AND BRETT COOMES — CROSS-APPELLANTS

CROSS-APPEAL FROM DAVIESS CIRCUIT COURT
v. HONORABLE JOSEPH W. CASTLEN III, JUDGE
ACTION NO. 06-CI-00153

JAMIE R. BRANTLEY IN HER CAPACITY AS
ADMINISTRATRIX OF THE ESTATE OF
GERALD R. BUSCHKOETTER, DECEASED CROSS-APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, NICKELL, AND THOMPSON, JUDGES.

NICKELL, JUDGE: Jamie R. Brantley (formerly Buschkoetter), as administratrix of the estate of Gerald R. Buschkoetter, deceased, and as guardian and next friend of Britt Renae' Brantley ("Appellant"), appeals from a summary judgment in favor of two Kentucky State Police (KSP) officers, Lonnie Bell and Brett Coomes, on appellant's claims for wrongful death and loss of parental consortium. Appellant argues that summary judgment was erroneously granted as there are disputed issues of material fact and the trial court erred in denying her motion for relief pursuant to CR[1] 60.02. We affirm.

In the early morning hours of February 5, 2005, KSP received a 911 call from the home of Gerald and Jamie Buschkoetter. Trooper Bell was the first to respond to the call accompanied by a Daviess County deputy sheriff. Upon their arrival, officers observed Gerald inside the home's garage dressed only in his underwear. Gerald ran into the home and down a set of stairs to the basement immediately upon seeing the officers. Brantley advised the officers that Gerald

[1] Kentucky Rules of Civil Procedure.

was armed with two loaded handguns and that he had fired multiple shots inside the home prior to their arrival. Brantley relayed to the responding officers that Gerald was bipolar, he had previously attacked her in December of 2004 and tried to suffocate her, and had recently exited his vehicle and laid in a travel lane of the William Natcher Parkway. She told the officers she and Gerald had been in an altercation that evening in which they had pointed handguns at one another; she had locked herself in a bathroom; Gerald broke down the door, disarmed her, and fired several rounds into the floor; and she called 911 but Gerald hung up before she could speak to an operator.

Bell positioned himself at the top of the basement stairs and began to communicate with Gerald. Trooper Coomes arrived and took up a position to assist Bell. Two other troopers arrived on the scene within minutes. Bell determined Gerald had barricaded himself in a bathroom in the basement. Gerald threatened to kill himself, even performing a "count-down," then firing three shots from one of the pistols. Bell eventually convinced Gerald to exit the bathroom. Gerald broke the door down trying to exit. Bell and Coomes were then able to observe that Gerald was, in fact, armed with two handguns. In continuing conversations with the officers, Gerald waved the two guns in their general direction. Officers did not believe Gerald was aiming at them, nor that they were in danger at that time, and thus used no force to end the confrontation. Gerald picked up shoes lying around the basement and began throwing them repeatedly at the officers. Officers still did not respond with any use of force.

During the conversation with Bell, Gerald indicated he had no desire to go to jail, did not want to "go back" to the hospital, and did not want reports of the incident to be published in the newspaper. Bell assured Gerald he would not go to jail, but would likely have to go to the hospital. Bell attempted to maintain a conversational tone with Gerald throughout the incident. Gerald requested he be given a pair of pants. Bell informed him he could have his pants if he put down his weapons. Gerald complied by putting his weapons on a small table near the bottom of the stairs and sitting down on a bench facing the officers. He informed the officers not to try anything because he "still had one ready"—apparently referring to a loaded firearm. Gerald was given the pants and after putting them on continued the dialogue with Bell and Coomes. At this point, the officers had been at the scene engaged with Gerald for approximately one hour.

The officers then observed Gerald "without warning or provocation" picking up the revolver and aiming it directly at them. Both believed this was a deliberate act and they were about to be shot. Bell and Coomes responded to the perceived threat by discharging their weapons.[2] Gerald was struck by two rounds.

Bell, Coomes, and the other two troopers descended the stairs. A loaded .38 caliber pistol appearing to have blood on it was recovered from underneath Gerald's body. EMS personnel entered the basement to render aid to Gerald. However, Gerald perished from the two gunshot wounds.

[2] Bell fired three rounds from his KSP-issued .40 caliber pistol and Coomes fired one round of buckshot from his KSP-issued 12-gauge shotgun.

Brantley filed suit on February 2, 2006, in the Daviess Circuit Court on behalf of Gerald's estate and as next friend of Gerald's minor daughter, naming as defendants the Commonwealth of Kentucky, Justice and Public Safety Cabinet, Department of State Police, along with Bell and Coomes, individually and in their official capacity as KSP troopers. The suit asserted a wrongful death claim by the Estate and a loss of parental consortium claim by the minor child. The defendants moved for a partial dismissal of the claims based on sovereign immunity grounds to which Brantley objected. After hearing arguments, the trial court dismissed the claims against the Justice and Public Safety Cabinet, KSP, and Bell and Coomes in their official capacity. The action against Bell and Coomes in their individual capacities was permitted to continue.

Also on February 2, 2006, Brantley asserted the same claims in an administrative action filed in the Board of Claims.[3] An evidentiary hearing was held before a hearing officer for the Board of Claims on September 17-18, 2007. On October 21, 2008, the hearing officer issued proposed findings of fact, conclusions of law, and an order recommending denial of the claim. No exceptions were filed to the recommendation. The Board of Claims adopted the hearing officer's report and issued a Final Order dismissing the wrongful death claim on November 21, 2008. No appeal was filed from this final order.

[3] The parties agreed that the loss of consortium claim was improperly brought in the Board of Claims action as such derivative claims are not within that body's jurisdiction.

On December 8, 2008, Bell and Coomes moved for summary judgment in the circuit court action. They alleged the final decision of the Board of Claims precluded re-litigation of the issues presented before that tribunal regarding their liability on Brantley's wrongful death claim. They further alleged, citing *Yanero v. Davis*, 65 S.W.3d 510, 522 (Ky. 2001), that all of their acts on the night of the shooting were discretionary functions of their jobs as state troopers and thus they were entitled to qualified discretionary immunity on all of Brantley's claims. Finally, they alleged there were no issues of material fact in dispute concerning the justification of their use of deadly force against Gerald, therefore entitling them to a judgment as a matter of law on the wrongful death and loss of parental consortium claims.

Brantley responded to the motion for summary judgment alleging the existence of "serious issues of a factual nature concerning the poor, if not total lack of, discretion exercised by Defendants." She further contended the Board of Claims decision did not act as a bar to the claims brought in the circuit court, nor did the earlier partial dismissal of the governmental parties or official capacity claims against Bell and Coomes based on sovereign or governmental immunity grounds.

Following a hearing on the motion, the trial court entered its twenty-two page order granting summary judgment to Bell and Coomes on August 5, 2009. The trial court set out a lengthy and detailed recitation of the facts as gleaned from the parties' filings and arguments, as well as the record from the

Board of Claims. The court found that the actions of the officers were discretionary and within the scope of their authority, they had acted in good faith in their dealings with Gerald, and they were thus entitled to qualified immunity. The court then discussed each of the alleged factual disputes Brantley raised in her response to the motion for summary judgment. In rejecting the proffered disputes as either immaterial to the case or refuted by the record, the trial court stated:

> [t]he Defendants have clearly shown not only that their actions were within the scope of their discretionary authority, but have made a prima facie case that there (sic) actions throughout the event were performed in good faith. Their actions constituted a good faith judgment call made in legally uncertain circumstances. The Plaintiffs have not rebutted the evidence presented by the Defendants in their Motion for Summary Judgment. Assertions alone are not sufficient to meet their burden. As indicated earlier, "a party's subjective beliefs about the nature of the evidence is not the sort of affirmative proof required to avoid summary judgment." *Haugh v. City of Louisville*, Ky.App., 242 S.W.3d 683, 686 (2007).

The trial court was reluctant to rule that Brantley's claims were precluded by collateral estoppel based on the Board of Claims action, instead finding the issue to be moot based on its earlier ruling that Bell and Coomes were entitled to qualified discretionary immunity and that there were no material facts in dispute. Thus, the trial court granted summary judgment in favor of Bell and Coomes. No motion to reconsider was filed.

On August 31, 2009, with the assistance of new counsel, Brantley filed her notice of appeal to this Court from the August 5 order.[4] Simultaneously, she moved the trial court for post-judgment relief pursuant to CR 60.02(a) and (f). She contended "the Responsive pleadings filed to the Summary Judgment Motion did not refute in detail the allegations made by the defendants as contained in the records cited by them in support of that Motion for Summary Judgment." She alleged the existence of "affidavits and other proof might have been placed in the record which would have justified a denial of the summary judgment motion." Thus, she sought reversal of the summary judgment and leave to present the proof set forth in the affidavits from herself and a law enforcement opinion witness attached to her motion. She contended the information contained in the affidavits established genuine issues of material fact rendering the entry of summary judgment inappropriate, and she requested the court consider the belated evidence on grounds of "mistake, inadvertence, surprise or excusable neglect."

Bell and Coomes responded to Brantley's motion and contended the issues raised had previously been raised and addressed by the trial court, and to the extent the issues had not already been raised, that she had ample opportunity to present the proffered evidence in the three years the matter had been pending in the circuit court, and most certainly during the seven-month period between the filing of the motion for summary judgment and the hearing. Bell and Coomes further

[4] Bell and Coomes cross-appealed from the trial court's denial as moot of their motion for summary judgment on grounds of collateral estoppel, election of remedies, and other statutory grounds, based on the resolution of Brantley's administrative action in the Board of Claims.

contended that the affidavits failed to present sufficient facts to justify overturning the summary judgment, but rather contained only improper opinions and speculation.

Following a hearing, the trial court orally denied Brantley's motion for relief from the bench. It set forth its reasoning in a nine-page written order entered on October 7, 2009. Brantley's subsequent combined motion for a new trial, to alter, amend or vacate the judgment, or to institute proceedings in lieu of a new trial was denied. This appeal followed.

Before this Court, Brantley first contends the trial court erred in granting summary judgment alleging that disputed issues of material fact existed, the trial court had improperly determined issues related to witness credibility which should have been reserved for a jury, and that the trial court utilized the wrong legal standard in making its conclusions. She further contends the trial court misapprehended the crux of her motion for post-judgment relief pursuant to CR 60.02, resulting in the improper denial of the motion. On cross-appeal, Bell and Coomes contend the trial court should have granted their motion for summary judgment on grounds of collateral estoppel and election of remedies based on the previous litigation in the Board of Claims.

Brantley first argues the trial court's entry of summary judgment was infirm. She alleges there were, in fact, genuine issues of material fact present and that the trial court improperly made credibility determinations about witness testimony which should have been made by a properly empaneled jury. She also

alleges that the trial court utilized the wrong standard in making its ruling, thus requiring reversal. We disagree.

The standard of review governing appeals from the grant of summary judgment is well settled. We must determine whether the trial court erred in concluding there was no genuine issue as to any material fact and the moving party was entitled to judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). Summary judgment is only 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." CR 56.03. In *Paintsville Hospital Co. v. Rose,* 683 S.W.2d 255 (Ky. 1985), the Supreme Court of Kentucky held that for summary judgment to be proper it must be shown that the adverse party cannot prevail under any circumstances. The Supreme Court has also stated "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." *Steelvest, Inc. v. Scansteel Service Center, Inc.,* 807 S.W.2d 476, 480 (Ky. 1991).

Appellate courts are not required to defer to the trial court since factual findings are not at issue. *Goldsmith v. Allied Building Components, Inc.,* 833 S.W.2d 378 (Ky. 1992). "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 [citation omitted]." *Steelvest,* 807 S.W.2d at 480. However, "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." *Id.* at 482. *See also* Philipps, *Kentucky Practice,* CR 56.03, p. 418 (6th ed. 2005).

Brantley alleges that the record from the Board of Claims as well as the pleadings filed in this action reveal several issues of material fact in dispute. Our review of the entire record does not bear out her contention. Brantley is correct in her assertion that there were differing accounts of the events surrounding the shooting presented by different witnesses. However, the test is not whether there are any disputed issues of fact, but rather whether the factual differences are material.

Bell and Coomes alleged in their motion for summary judgment that the record reflected no factual issues regarding the justification or reasonableness of their use of force against Gerald. They contended that the undisputed facts revealed they had been called upon to defuse a tense and hostile situation with an armed and mentally unstable individual who had, immediately prior to their arrival and during their time on the scene, shown his willingness to discharge his firearms inside the residence. They stated that the record reflected their attempts at negotiating with Gerald to reach a peaceful conclusion to the standoff and their lack of provocation of any violent acts. They argued the undisputed facts before the court indicated they did not use any force—much less deadly force—until

Gerald inexplicably grabbed a gun they knew to be loaded and intentionally pointed it at them in a threatening manner. Thus, Bell and Coomes contended that their use of force was an act of discretion entitling them to qualified immunity, was not in any way negligent, and was completely justified under the circumstances, thereby eliminating any liability on their parts for Gerald's death. They attached numerous documents in support of their motion, including a transcript of evidence from the Board of Claims hearing.

Brantley responded by setting forth her version of the evening's events which differed slightly from that put forward by the troopers. She contended the officers: "rushed" Gerald, not giving him sufficient time to "cool down" from his frenzy; failed to utilize her in their negotiations; refused to allow her to seek professional help from Gerald's medical doctor or psychologist; had other, non-violent alternatives available; and their actions constituted gross negligence, wanton disregard for human life and an over-reaction to the situation. She argued the ultimate issue to be determined by the trial court was the reasonableness of the officers' assertion that Gerald was a threat to them immediately prior to the shooting. She believed that he was not and the officers claim to the contrary was unreasonable. Brantley argued there were issues of material fact evident from the record as to Bell's and Coomes' negligence and liability for Gerald's death.

Our review of the record reveals many of the alleged factual issues raised and argued by Brantley concern peripheral events unrelated to civil liability

for Gerald's death. As noted by the trial court, the remaining issues were supported only by speculation and her subjective beliefs, and "[a] party's subjective beliefs about the nature of the evidence is not the sort of affirmative proof required to avoid summary judgment." *Haugh*, 242 S.W.3d at 686. Brantley had ample opportunity to pursue discovery on her claims and to place evidence in the record over the three years this action was pending. However, she failed to produce evidence of any material issues of fact on her claims. Therefore, the trial court properly granted summary judgment to the officers.

Next, Brantley argues the trial court improperly made determinations regarding the credibility of the various witnesses and based its ultimate decision on her lack of contradictory or impeaching evidence, thereby utilizing the wrong legal standard in granting summary judgment. Again, we disagree. The language Brantley relies upon in support of this argument does not appear anywhere within the order granting summary judgment as she would have this Court believe. Rather, the complained-of verbiage comes from the order denying her motion for post-judgment relief and relates solely to that motion. In the final paragraph of that order, the trial court—discussing the evidence Brantley proffered with her CR 60.02 motion—stated "[t]he Defendants' eyewitness accounts of events are credible in light of the undisputed events that occurred prior to the shooting. The evidence proffered by Plaintiffs does not directly contradict or impeach Defendants' testimony." This statement, when taken out of context, would appear to support Brantley's argument. However, upon reading it in the context of the

remainder of the order, it becomes clear that the trial court was discussing the lack of evidence sufficient to overturn its grant of summary judgment, and was not referring to its basis for making the initial ruling. There is absolutely no indication in the record that the trial court used an incorrect legal standard nor made inappropriate determinations regarding the credibility of any testimony or evidence. In granting summary judgment, the trial court explicitly found there to be no disputed issues of material fact and that it would be impossible for Brantley to prevail at trial. This is clearly the correct standard upon which to decide the appropriateness of summary judgment. CR 56.03. Brantley's contention to the contrary is without merit.

Finally, Brantley contends the trial court misapprehended the grounds upon which she was seeking post-judgment relief and therefore erroneously denied her CR 60.02 motion.[5] She argues the affidavits attached to her motion sought to highlight the existence of issues of fact which should have been allowed to proceed to a jury. She contends this was not newly discovered evidence, but rather evidence she had been prohibited from introducing earlier due to a mistake or excusable neglect resulting from miscommunications with her previous attorney. We discern no error in the trial court's ruling.

The decision "to grant relief from a judgment or order pursuant to CR 60.02 is one that is generally left to the sound discretion of the trial court[.]" *US*

[5] Brantley's argument to this Court is identical to that made before the trial court in her unsuccessful attempt to have the denial of her CR 60.02 motion set aside.

Bank, NA v. Hasty, 232 S.W.3d 536, 540 (Ky. App. 2007) (quoting *Schott v. Citizens Fidelity Bank and Trust Co.*, 692 S.W.2d 810, 814 (Ky. App. 1985)). Absent an abuse of that discretion, the trial court's determination will not be disturbed on appeal. *Goodyear Tire and Rubber v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000).

Brantley was represented by competent counsel throughout the litigation below. She had ample opportunity to develop the record. Although she asserts she was unable to introduce the proffered evidence due to a miscommunication with her attorney, she offers no support or details regarding the communication breakdown, nor support for her inability to produce the evidence during the pendency of the litigation. Brantley avoids directly accusing her prior attorney of negligence, but such conduct is strongly intimated in her pleadings. Nevertheless, even were we to believe that Brantley's counsel had acted negligently in failing to introduce the proffered evidence, such "[n]egligence of an attorney is imputable to the client and is not a ground for relief under CR 59.01(c) or CR 60.02(a) or (f)." *Vanhook v. Stanford- Lincoln County Rescue Squad, Inc.*, 678 S.W.2d 797, 799 (Ky. 1984) (citing *Childers v. Potter*, 291 Ky. 478, 165 S.W.2d 3 (1942)).

Brantley contends she was seeking to introduce additional evidence only to show that summary judgment was improper. At the hearing on her motion, counsel stated "more evidence is required to prove genuine issues of material fact and that's what we're trying to do." Brantley added no new arguments to those

already presented, and the issues raised in her motion and discussed in the affidavits had been previously raised and determined by the trial court. Relief under CR 60.02 is an extraordinary remedy "available only when a substantial miscarriage of justice will result from the effect of the final judgment." *Wilson v. Commonwealth*, 403 S.W.2d 710, 712 (Ky. 1966). We are unable to find the trial court abused its discretion in denying Brantley the extraordinary relief she sought and we likewise are unable to discern any miscarriage of justice resulting from the judgment.

On cross-appeal, Bell and Coomes contend the trial court should have granted their motion for summary judgment on additional grounds including collateral estoppel and election of remedies based on the previous litigation in the Board of Claims. However, because of our resolution of the direct appeal, no further discussion regarding the cross-appeal is warranted.

Therefore, for the foregoing reasons, the judgment of the Daviess Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT/CROSS-APPELLEE:	BRIEFS FOR APPELLEES/CROSS-APPELLANTS:
Nancy E.S. Calloway Elkton, Kentucky	Roger G. Wright Frankfort, Kentucky