RENDERED: OCTOBER 29, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001693-MR

MATTHEW TYLER PIERCE — APPELLANT

v.

APPEAL FROM BOYLE CIRCUIT COURT
HONORABLE DARREN W. PECKLER, JUDGE
ACTION NO. 08-CI-00368 AND
NO. 08-CI-00429

SHARON BROADDUS, AS
ADMINISTRATRIX OF THE ESTATE
OF ASHELY NICOLE BROADDUS — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON AND LAMBERT, JUDGES; HENRY,[1] SENIOR JUDGE.

HENRY, SENIOR JUDGE: Matthew Tyler Pierce appeals from a summary judgment entered in favor of Sharon Broaddus in her capacity as administratrix of

[1] Senior Judge Michael L. Henry 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.

her daughter's estate. After our review, we affirm the determination of the Boyle Circuit Court.

This case arises from a tragic multiple vehicle accident that occurred on March 17, 2008, near Danville, Kentucky. The accident occurred during the daylight hours. Weather was not a factor. Dean Jarboe, age fifty-six, was driving a 2002 Ford F-250 pickup truck westbound on Kentucky State Route 34. Twenty-year-old Ashley Broaddus was driving a 2004 Pontiac Grand Prix eastbound. Twenty-three-year-old Matthew Tyler Piece was a passenger in Broaddus' vehicle. Also travelling eastbound on Route 34, just behind Broaddus, was a 2003 Chevrolet Tahoe SUV driven by forty-eight-year-old Anita Christopher.

Jarboe's truck crossed the center-line and veered into the eastbound lane. He told police he dropped something, was looking for it on the floor of the pickup and momentarily was not watching the road. An independent witness stated he thought he saw the driver of the truck looking down on the floor of the pickup as it crossed the center line and moved into the eastbound lane of traffic. Two vehicles ahead of Broaddus were able to swerve out of the way as the truck veered toward them. The truck struck the Grand Prix almost head on. Jarboe's truck flipped over and skidded to a stop while still on its roof. The Grand Prix was split in half by the impact.

Ashley Broaddus was ejected from her vehicle and came to rest on the shoulder of the road. As Christopher attempted to avoid the collision in front of

her she struck Broaddus with the SUV and then crashed into the wreckage of one half of the Grand Prix. Broaddus died as a result of her injuries. Christopher and Jarboe were injured. Because of the seriousness of his injuries, Pierce was airlifted to the hospital.

Ashley's mother, Sharon Broaddus, was appointed adminstratrix of her daughter's estate. On July 21, 2008, the estate filed a wrongful death action against Jarboe. That complaint was later amended to include Christopher as a defendant. On August 18, 2008, Pierce filed a separate action alleging the negligence of Broaddus, Jarboe and Christopher. Those two actions were consolidated by the trial court by order entered January 8, 2009. Pierce reached a settlement with Jarboe, the primary tortfeasor.

On July 15, 2009, Broaddus filed a motion for summary judgment as it pertained to Pierce's negligence claim against Ashley Broaddus. Pierce's response indicated his belief that Ashley was negligent by failing to have taken appropriate evasive action to avoid the accident. Summary judgment as it related to Pierce's negligence claim was granted by the trial court in favor of Broaddus. This appeal then 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." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories,

stipulations, and admissions on file, together with 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." 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 Serv. Ctr., Inc*., 807 S.W.2d 476, 480 (Ky. 1991).

Pierce now argues summary judgment was inappropriate because there remained genuine issues of material fact. Specifically, he argues that Ashley was negligent by not avoiding the collision, contributing to his injuries. Additionally, he relies on the "last clear chance" doctrine stating Ashley had the last clear chance to avoid the collision. Much of his argument arises from an accident reconstruction report generated by the Kentucky State Police. A single page from the report was provided to the trial court along with a diagram of the accident and excerpts from a State Trooper's deposition. The rest was not provided to the trial court, yet has been included as an appendix to his brief in this case. That appendix also includes a series of photographs taken at the scene of the crash. Those pictures were also not provided to the trial court. "Except for matters of which the appellate court may take judicial notice, materials and documents not included in the record shall not be introduced or used as exhibits in support of briefs." CR 76.12(4)(c)(vii). Accordingly, we have not considered any material not considered by the trial court in reaching our decision.

"The party opposing a properly presented summary judgment motion cannot defeat it without at least presenting some affirmative evidence showing the existence of a genuine issue of material fact for trial." *City of Florence, Kentucky v. Chipman*, 38 S.W.3d 387, 390 (Ky. 2001). Here, the evidence properly before the court for its consideration on the motion for summary judgment supported entry of the judgment, and the evidence presented in response to the motion was insufficient to raise a genuine issue of material fact regarding Ashley's alleged negligence.[2] Nothing in the record considered by the trial court indicates the existence of an issue of fact regarding Ashley's negligence; indeed, such evidence as there is indicates the contrary.

Pierce also argues that Ashley had the last clear chance to avoid the accident and was, therefore, negligent in not doing so. That argument was not however, presented to the trial court. "The appellants will not be permitted to feed one can of worms to the trial judge and another to the appellate court." *Kennedy v. Commonwealth,* 544 S.W.2d 219, 222 (Ky. 1976), *overruled on other grounds by Wilburn v. Commonwealth,* 312 S.W.3d 321 (Ky. 2010).

Further, in our view the last clear chance doctrine is no longer viable in Kentucky since the adoption of pure comparative negligence in 1984. The doctrine of last clear chance was "a humanitarian one, based on the principle that no one may negligently injure another or his property, even though the other is at

[2] Even if the materials included in the appendix for Pierce's brief had been submitted as part of the record in this case, our *de novo* review would have still found them lacking. If anything, the report's conclusion that Ashley did not have sufficient time to react further negates Pierce's claim of negligence.

fault, if the former has an opportunity to avoid the injury after becoming aware of the other's perilous predicament." *Swift & Co. v. Thompson's Adm'r,* 308 Ky. 529, 532, 214 S.W.2d 758, 759 (Ky. 1948). But in *Kennedy v. Hageman,* 704 S.W.2d 656 (Ky. App. 1985), referring to our Supreme Court's opinion in *Hilen v. Hays,* 673 S.W.2d 713 (Ky. 1984), a panel of this Court expressed our belief that "the majority of the Kentucky Supreme Court clearly indicated that they intended, by adopting the doctrine of comparative negligence, to also abolish the doctrine of last clear chance." *Kennedy v. Hageman* at 658. Our interpretation of the effect of the *Hilen* decision on the last clear chance doctrine manifestly resulted from our understanding that pure comparative negligence and last clear chance are both legal doctrines intended to accomplish the same end—a fair apportionment of fault. Put another way, we are convinced that *Kennedy* correctly decided that the doctrine of pure comparative negligence in Kentucky effectively "swallowed up" the doctrine of last clear chance. This conclusion is supported by the fact that in the twenty-five years since *Kennedy* was decided our Supreme Court has neither reversed nor criticized its holding, nor are we aware of any Kentucky case in that time that has approved the use of last clear chance.

The judgment of the Boyle Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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