

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-000623-MR

WILLIE SHORT, JR.

APPELLANT

v. APPEAL FROM KNOTT CIRCUIT COURT
HONORABLE KIMBERLEY D. CHILDERS, JUDGE
ACTION NO. 09-CI-00181

TOMMY SLONE, as ADMINSTRATOR
of the ESTATE OF PHILLIP SLONE and
REBECCA SLONE

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: NICKELL AND THOMPSON, JUDGES; ISAAC,¹ SENIOR JUDGE.

ISAAC, SENIOR JUDGE: Willie Short, Jr. appeals from a summary judgment granted in favor of Phillip Slone and Rebecca Slone on his claim for indemnity stemming from an automobile accident. Short argues that the trial court's order was interlocutory and that summary judgment was inappropriate and premature

¹ Senior Judge Sheila R. Isaac 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.

because he is entitled to indemnity if Phillip was found to be primarily liable for the accident. We reverse and remand.

Phillip Slone was driving southbound on KY 899 in Knott County, Kentucky. Rebecca Slone was a front seat passenger. Phillip attempted to make a left turn into a parking lot when his car was struck by Short travelling southbound on KY 899. Phillip filed a complaint against Short alleging negligence on May 15, 2009. Rebecca intervened in the action and asserted her own personal injury claims. In response to Rebecca's claim, Short filed a counterclaim for indemnity against Phillip as Rebecca's host driver and asserted that Phillip was the primary cause of the accident. Phillip filed a motion for summary judgment on the claim for indemnity, which the trial court granted. The trial court also stated in its order that the jury would receive an apportionment instruction, should the evidence permit, and included finality language. Short then filed a motion to amend the order asserting that it was interlocutory, which the trial court denied. This appeal followed.²

Short first argues that the trial court's ruling was interlocutory because fault had not yet been determined. Kentucky Rules of Civil Procedure (CR) 54.02(1) states:

(1) When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may grant a final judgment upon one

² We note that Phillip Slone passed away during the pendency of this appeal and that this Court entered an order on March 8, 2011, reviving the action and substituting Tommy Slone, Administrator of the Estate of Phillip Slone, as the appellee.

or more but less than all of the claims or parties only upon a determination that there is no just reason for delay. The judgment shall recite such determination and shall recite that the judgment is final. In the absence of such recital, any order or other form of decision, however designated, which adjudicates less than all the claims or the rights and liabilities of less than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is interlocutory and subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

There were multiple claims presented in the case. The trial court fully adjudicated the indemnity claim and included the CR 52.04 finality language. Therefore, we conclude that the order was final and is properly before this Court.

Short next argues that he is entitled to indemnity if it is determined that Phillip's negligence was the primary and efficient cause of the accident.

In reviewing a grant of summary judgment, our inquiry focuses on "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); CR 56.03. "[T]he 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).

The Supreme Court of Kentucky held that the principles of comparative fault did not abolish the common law right to indemnity, which is available "to one exposed to liability because of the wrongful act of another with

whom he/she is not in pari delicto” or equally liable. *Degener v. Hall Contracting Corp.*, 27 S.W.3d 775, 780 (Ky. 2000). As stated in *Degener*:

The cases in which recovery over is permitted in favor of one who has been compelled to respond to the party injured are exceptions to the general rule, and are based upon principles of equity. Such exceptions obtain in two classes of cases: (1) Where the party claiming indemnity has not been guilty of any fault, except technically, or constructively, as where an innocent master was held to respond for the tort of his servant acting within the scope of his employment; or (2) where both parties have been in fault, but not in the same fault, towards the party injured, and the fault of the party from whom indemnity is claimed was the primary and efficient cause of the injury.

Id. at 780 (quoting *Louisville Ry. v. Louisville Taxicab & Transfer Co.*, 256 Ky. 827, 77 S.W.2d 36, 39 (1934)). Therefore, the apportionment statute does not abolish the common law right of indemnity where one is only constructively or secondarily liable to a plaintiff. Further, “[i]ndemnity is not an issue until fault has been determined.” *Clark v. Hauck Mfg. Co.*, 910 S.W.2d 247, 253 (Ky. 1995), *overruled on other grounds by Martin v. Ohio County Hosp. Corp.*, 295 S.W.3d 104 (Ky. 2009).

In the present case, the apportionment of liability has not been determined. Further, there are genuine issues of material fact regarding the determination of fault as evidenced by the parties’ conflicting versions of the accident. Here, it is possible that “both parties have been in fault, but not the same fault” toward Rebecca, but the issue of fault has not been adjudicated. Therefore, summary judgment was inappropriate.

Accordingly, the order of the Knott Circuit Court is reversed and remanded for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

Jeffrey A. Taylor
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