RENDERED: FEBRUARY 3, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-002096-MR

VALERIE D. JOHNSON, AS GUARDIAN
OF MICHAEL H. JOHNSON; AND
MICHAEL H. JOHNSON — APPELLANTS

v.

APPEAL FROM SCOTT CIRCUIT COURT
HONORABLE ROBERT G. JOHNSON, JUDGE
ACTION NOS. 10-CI-00121&10-CI-00337

BETTY BREWER; CHARLES F.
BREWER; GREGORY BREWER
AND INDIANA INSURANCE
COMPANY — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, STUMBO AND THOMPSON, JUDGES.

CLAYTON, JUDGE: Michael H. Johnson and his guardian, Valerie D. Johnson, bring this appeal from a Scott Circuit Court order granting summary judgment to

Betty Brewer, Charles F. Brewer, Gregory Brewer, and Indiana Insurance Company (hereinafter "the Brewers").

The underlying circuit court civil action arose from an automobile accident which occurred on February 2, 2008, at the intersection of US 62 and US 460 in Georgetown, Kentucky. The weather conditions were clear and sunny. Michael H. Johnson was travelling southbound on US-62, which was undergoing construction. According to the Johnsons, Michael became confused due to a lack of adequate signs warning of the construction and related lane closures. He drove through a red light at the intersection of US-460 and collided with the passenger side of a vehicle being driven westbound by Charles F. Brewer. Brewer's wife Betty and his son Gregory were passengers in the vehicle, and suffered various physical injuries. Johnson was completely disabled by the injuries he suffered in the accident; he has no memories of the collision. His wife, Valerie Johnson, who was not present at the accident, was appointed his guardian and represents Michael in this appeal.

On February 3, 2010, Betty and Gregory Brewer brought suit against Charles Brewer and Michael Johnson in the Scott Circuit Court. The complaint alleged that each defendant's negligence in operating his vehicle was a significant factor in causing the collision. Charles filed a cross-claim against Michael Johnson; and the Johnsons subsequently brought a cross-claim against Charles. The Johnsons also instituted a second lawsuit against Charles and his automotive insurer, Indiana Insurance Company, for underinsured motorist benefits. The two

lawsuits were consolidated by order of the Scott Circuit Court entered on May 6, 2010.[1]

After some discovery had occurred, including the taking of the depositions of the Johnsons and the Brewers, Charles filed a motion for summary judgment on August 30, 2010. Indiana Insurance Company moved for summary judgment on September 15, 2010. Following a hearing, the circuit court granted the motions on October 19, 2010. The Johnsons filed a motion to alter, amend or vacate which was denied by the circuit court on November 12, 2010, and this appeal followed.

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); Kentucky Rules of Civil Procedure (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 v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). "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."

[1] The Johnsons are also pursuing a separate civil action alleging negligence against the contractor and subcontractors responsible for maintaining the intersection during the road construction process; the circuit court denied a motion by one of the contractor defendants to consolidate this third suit with the case before us.

Id. "The party opposing a properly presented summary judgment motion cannot defeat it without presenting at least 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).

On appeal, the Johnsons argue that summary judgment was inappropriate because the Brewers had failed to show that there were no genuine issues of material fact regarding whether Charles Brewer had observed the applicable standard of care for a driver entering an intersection on a green light. Although it is undisputed that Michael Johnson ran the red light and that Charles Brewer was proceeding on a green light through the intersection, "[c]omparative negligence . . . calls for liability for any particular injury in direct proportion to fault." *Hilen v. Hays*, 673 S.W.2d 713, 718 (Ky. 1984). "A driver approaching an intersection with the right-of-way has no absolute right to proceed so unconditional that she can ignore duties of reasonable lookout, sounding a horn when necessary, and avoiding collision when there is reasonable opportunity to do so." *Wittmer v. Jones,* 864 S.W.2d 885, 888 (Ky. 1993). "A green light or 'go' signal, is not a command to go regardless of other persons or vehicles that may already be at the intersection but is a qualified permission to proceed carefully in the direction indicated." *Swartz v. Humphrey*, 437 S.W.2d 750, 753 (Ky. 1969).

The Johnsons contend that factual disputes remain regarding whether Charles Brewer observed his duty to keep a reasonable lookout and whether he made a reasonable attempt to avoid the collision. There were no outside witnesses

to the accident; the only individuals present were the Brewers and Michael Johnson. As we have noted, Michael Johnson has no recollection of the accident. Charles Brewer remembers very little of the accident; in his deposition, he testified that he did not see Johnson's vehicle at all before the impact. Betty Brewer, his wife, who was in the front passenger seat, testified in her deposition as follows:

> Q. When is the first time you remember seeing Mr. Johnson's vehicle?
>
> A. When he was fixing to hit us. I seen him turning – turning toward …
>
> Q. Where was the vehicle you were in at that time?
>
> A. We was going under the stop – stop – stoplight. We was …
>
> Q. Were you already in the intersection at the –
>
> A. Uh-huh.
>
> Q. At the – the first time you see Mr. Johnson's vehicle, were you already in the intersection?
>
> A. Yes ma'am.
>
> Q. And tell me – tell me about that. Where – which way were you looking? How did you first come to see him?
>
> A. I was looking straight ahead, and then I seen him, you know, when he was coming. I seen him out of the corner of my eye, you know, coming.
>
> Q. And how close was his vehicle to the vehicle you were in at the first time you saw him?
>
> A. Just a few feet. Just …
>
> Q. So that is very, very close?

A. It was very close, yes. Yes, ma'am.

Later in her deposition, Betty testified that Charles was driving at about forty miles per hour, although she acknowledged that she had not looked at the speedometer and was guessing. The applicable speed limit is forty-five miles per hour. When she was asked whether her husband had taken any action to try to avoid the collision, such as braking, steering around the other car or sounding the horn, she stated that she could not remember. She did recall that she "hollered . . . 'what is he doing?'" immediately before the impact.

Gregory Brewer, who was seated in the back of the car behind his mother, testified in his deposition that he noticed that the light was green when their vehicle approached the intersection. He testified that he knew they were not going too fast, but that he did not see the speedometer.

> Q. Did you notice Mr. Johnson's vehicle at any time before your car entered –
>
> A. No, ma'am.
>
> Q. – the intersection?
>
> A. No, ma'am.
>
> . . . .
>
> Q. And I think you've told me the first time you noticed Mr. Johnson's vehicle, you were already in the intersection?
>
> . . . .
>
> A. Right.

Q. And he was – I think you said 1 foot?

A. Yeah, 1 foot when he hit – when I saw him. I couldn't even get it out when – he done hit us before I even could say anything.

Q. Did anybody else in the car, to your knowledge, notice Mr. Johnson's vehicle before you did?

A. My mom hollered – I remember her – "What's he doing?" and everything, but I was – I was – happened to look at her driver – well, the passenger window, front window, her door window when I saw him.

Q. And when you heard your mom holler, is that what caused you to turn your head and notice his car?

. . . .

A. Yes, ma'am.

Later in the deposition, when Gregory was asked if the accident could have been avoided or made less severe if his father had seen Johnson's car, he stated:

Maybe been less severe if we saw him. But as far as – because like I say, it happened so fast. I mean, you couldn't see him at the time and everything. But he – my dad probably couldn't do anything because the way we were at and everything. Because if he did hit his brakes, it still probably wouldn't have stopped and everything, because I don't think he could stop it.

Q. Could he – do you think he could have slowed his vehicle or stopped his vehicle had he seen Mr. Johnson before he did?

A. I – I couldn't tell you. I wouldn't know. . . . Well, it happened so fast, you couldn't – I mean, because I didn't

> see him. I mean, just right when he was getting ready to hit us. I mean, you couldn't even see him down the road.

On the basis of this testimony, the Johnsons argue that a factual dispute remains regarding whether Charles was keeping a reasonable lookout, since both his passengers were able to see the oncoming car before the collision, and in Betty's case, even had time to shout a warning. Thus, their testimony does not foreclose the possibility that an attentive driver traveling at the speed limit would have observed the oncoming vehicle and been able to take evasive measures.

As further evidence to support the existence of a factual dispute, the Johnsons rely on a conflict between Gregory's deposition testimony and photographs of the topography of the intersection. When Gregory was asked whether there was any obstruction to the right that would have prevented anyone in the Brewer vehicle from seeing Charles Johnson's car as it approached the intersection, he replied: "Yeah. The farm has a – like, a hilly, like. You couldn't – you had to almost be on the intersection before you could see anybody." At the hearing on the summary judgment motions, the Brewers' attorney stated that, in approaching the intersection from the direction that the Brewers had, the "lay of the land" prevents a driver from seeing the traffic until he or she "pretty much" gets to the intersection, and that Charles did not therefore have an opportunity to take evasive action. The Johnsons contend that police photographs of the intersection which were taken at the time of the accident and are in the record

indicate otherwise. We agree that the photographs are not conclusive. Thus, a factual dispute exists regarding how much of the intersection is visible to traffic approaching from the west.

Next, the Johnsons argue that simply because the sole eyewitnesses who are able to testify about the accident deny that Charles did anything wrong is not dispositive, and that a jury should assess their credibility. It is well established that the credibility of a witness is a matter for the jury. *Estep v. Commonwealth*, 957 S.W.2d 191, 193 (Ky. 1997). "Where questions exist regarding the credibility of witnesses and the weight of evidence, such matters must await trial and not be determined on motion for summary judgment." *Amos v. Clubb*, 268 S.W.3d 378, 382 (Ky. App. 2008). We agree that a jury should assess the credibility of Betty and Gregory Brewer's testimony regarding the events immediately preceding the collision.

The Johnsons further contend that Betty and Gregory's credibility is in dispute because of the allegations they made against Charles in the complaint they filed against Charles Brewer and Michael Johnson. The complaint charged that each of the defendants "was operating his vehicle in a negligent manner." It further alleged that each defendant's negligence was a significant factor in causing the collision and that Gregory suffered injuries to his left arm, neck, ribs and left shoulder, that Betty suffered injuries to her legs, ribs, internal organs and brain, as well as loss of income, loss of ability to earn and pain and suffering. The Brewers argue that the unverified allegations in the complaint are of little significance as

they are not admissions of fact but rather mere assertions of a claim. Nonetheless, on its face, the complaint may be admissible.

> [Kentucky Rules of Evidence] KRE 801A(b) 1 allows the introduction as non-hearsay of an adverse party's admissions, including admissions contained in superceded or abandoned pleadings, but only against the declaring party." *See Dalton v. Mullins*, 293 S.W.2d 470 (Ky. 1956) (pre-Rules holding that Appellant's abandoned pleading was admissible as competent evidence against Appellant).

Hyman & Armstrong, P.S.C. v. Gunderson, 279 S.W.3d 93, 119 (Ky. 2008).

Because material issues of fact remain regarding Charles Brewer's observance of the duty to maintain a reasonable lookout and maintain a safe speed, the credibility of the witnesses, and the topography of the intersection, summary judgment was not appropriate in this case.

The order granting summary judgment to the Brewers and Indiana Insurance Company is reversed, and the matter is remanded for further proceedings in accordance with this opinion.

ALL CONCUR.

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