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TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000929-MR

JASON GOLDEN

APPELLANT

v. APPEAL FROM JOHNSON CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
ACTION NO. 10-CI-00411

PAINTSVILLE CITY UTILITIES

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: LAMBERT, THOMPSON, AND VANMETER, JUDGES.

LAMBERT, JUDGE: Jason Golden appeals from the Johnson Circuit Court's April 5, 2011, entry of summary judgment in favor of defendant Paintsville City Utilities and the court's April 15, 2011, order denying his motion to alter, amend, or vacate the entry of summary judgment. Discerning no reversible error, we affirm the orders of the trial court.

On June 24, 2009, Golden was sitting in a parked vehicle in the parking lot of Conley Tire in Johnson County, Kentucky. As Golden was sitting in his car after finishing his business in that establishment, his vehicle was struck by a moving vehicle which had just been involved in another collision. A vehicle driven by Fred Rose turned from the westbound lane into the eastbound lane of Kentucky Route 40, impacting a vehicle driven by Larry Herald, who was driving a vehicle owned by Paintsville City Utilities in the course and scope of his employment. Herald's vehicle then impacted Golden's parked vehicle. Golden suffered severe injuries and subsequently filed a personal injury action against Fred Rose, Randy Hale, California Casualty General Insurance Company of Oregon, Hartford Insurance Company, and the Appellee in the instant case, Paintsville City Utilities.

All claims asserted against Fred Rose, California Casualty, and Hartford Insurance were dismissed with prejudice as settled. The claims against Randy Hale were dismissed with prejudice by entry of summary judgment. Golden's remaining cause of action was his negligence claim against Paintsville City Utilities.

Paintsville City Utilities filed a motion arguing that it was entitled to summary judgment on all claims asserted against it as the record was devoid of any evidence to support or provide a legitimate basis for Golden's negligence claims against it or its employees. On April 5, 2011, the trial court granted Paintsville City Utilities' motion for summary judgment and dismissed Golden's action.

Golden then filed a motion to alter, amend, or vacate the court's order granting summary judgment to Paintsville City Utilities. Golden argued that material issues of fact existed which were supported by the testimony of witness Janet Preece. Preece had testified that immediately prior to the accident at issue, the vehicle operated by Larry Herald, an agent/employee of Paintsville City Utilities, fishtailed. Golden's motion to alter, amend, or vacate was denied on May 9, 2011. This appeal now follows.

The standard of review on appeal when a trial court grants a motion for 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." *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001) (citing *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996)).

Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court will review the issue *de novo*.

Id.

Under the Kentucky Rules of Civil Procedure (CR), summary judgment shall be rendered forthwith 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 judgment as a matter of law. CR 56.03. 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 nonmoving party to produce evidence at the

trial warranting a judgment in his or her favor. *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991).

Just as he did below, Golden argues on appeal that there existed a genuine issue of material fact and that summary judgment in this case was improper. Specifically, Golden argues that Janet Preece's testimony at her deposition indicated that Herald did not have his vehicle under control at one point during the subject motor vehicle accident.

Paintsville City Utilities argues that the record conclusively establishes that Golden's cause of action against it is untenable because there is absolutely no evidence which would suggest that Herald breached the applicable duty of care owed under the circumstances of the subject accident.

We agree with Paintsville City Utilities that summary judgment was proper in the instant case. Under Kentucky law, actionable negligence consists of a duty, a breach thereof, and a consequent injury; and the absence of any of the three elements is fatal to a negligence claim. *M & T Chems., Inc. v. Westrick*, 525 S.W.2d 740, 741 (Ky. 1974). In order to state a cause of action based on negligence, "a plaintiff must establish a duty on the defendant, breach of the duty, and a causal connection between the breach of the duty and an injury suffered by the plaintiff." *Lewis v. B & R Corp*, 56 S.W.3d at 436-37.

In the case at bar, the evidence of record clearly establishes that Paintsville City Utilities' employee, Larry Herald, did not breach his duty to exercise ordinary care under the circumstances of the subject automobile accident.

The testimony establishes that Herald was operating his vehicle within his eastbound lane of travel and was otherwise proceeding with all due care in a reasonably prudent manner until the time that the vehicle operated by Fred Rose suddenly turned from the westbound lane of Kentucky Route 40 into the eastbound lane, directly into Herald's path. The Rose vehicle impacted Herald in his eastbound lane of travel, and the Herald vehicle subsequently impacted Golden's vehicle, injuring him.

There is no evidence of record to indicate any dispute with regard to the factual circumstances of the subject accident. Contrary to the statement contained in Golden's brief, Janet Preece did not testify that Herald "did not have his vehicle under control at one point during the subject motor vehicle accident." This statement is based upon Preece's use of the word "fishtail" in describing a movement of Herald's vehicle that she observed momentarily immediately after she observed the out-of-control Rose vehicle approaching her in such a manner as to create in Preece the fear of imminent collision. Preece testified unequivocally that during the entire time of Preece's observation of the Herald operated vehicle, it remained completely in Herald's proper lane of travel. Preece explained that the Herald operated vehicle was approaching the scene of the subject accident in a prudent manner and that the "fishtail" movement of Herald's vehicle resulted only from Herald applying his brakes to avoid the "chaotic" situation created by Rose. There is simply no evidence that Herald's actions caused or contributed to the accident involving Golden's vehicle. The undisputed evidence establishes that the

force of the impact caused by Rose suddenly crossing the center line and impacting Herald's vehicle is what caused the subsequent collision between Herald and Golden's parked car. Accordingly, there is no genuine issue of material fact, and summary judgment was appropriate.

Based on the foregoing, we affirm the orders of the Johnson Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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