

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001667-MR

KIMBERLYN CARPENTER

APPELLANT

v. APPEAL FROM JESSAMINE CIRCUIT COURT
HONORABLE C. HUNTER DAUGHERTY, JUDGE
ACTION NO. 11-CI-00925

JEFFREY RIESTER

APPELLEE

OPINION
AFFIRMING

** **

BEFORE: ACREE, CHIEF JUDGE; JONES AND MOORE, JUDGES.

ACREE, CHIEF JUDGE: Kimberlyn Carpenter appeals, *pro se*, from the Jessamine Circuit Court's September 24, 2012 order granting summary judgment in favor of Appellee Jeffrey Riestler. We are asked to determine whether the circuit court erred when it found that no genuine issues of material fact existed and that Riestler was entitled to judgment as a matter of law. We affirm.

I. Facts and Procedure

At 3:30 a.m. on a brisk September morning, Carpenter drove his vehicle through a closed gate onto Riester's farm. Carpenter's headlights woke Riester. Riester observed Carpenter's truck travel past his home and enter the field behind his house. Riester hopped into his farm truck and drove to the back of his farm to investigate. Upon arriving, Riester observed Carpenter driving towards him. Riester stopped his truck on the farm roadway. Carpenter did not stop. Instead, Carpenter crashed his vehicle into Riester's truck, causing damage.

Riester approached Carpenter to see if he was injured. Carpenter smelled of alcohol and could not stand. Carpenter attempted numerous times to leave Riester's farm, but Riester believed Carpenter to be too intoxicated to drive. Riester later described Carpenter to police as "extremely intoxicated." Because of his hasty departure, Riester failed to grab his cell phone before leaving his house. Consequently, Riester escorted Carpenter to his truck and drove back home where he called 911.

Prior to exiting his vehicle, Riester removed the pistol he carried in the farm truck to prevent Carpenter from accessing it. After calling 911, Riester waited outside for the sheriff's arrival; Carpenter remained in Riester's truck. When Carpenter attempted to get out of the truck, Riester ordered him back in; Carpenter asked for help. Apparently, by this point Carpenter's legs were dangling out the truck door. When Riester approached Carpenter, he stabbed Riester with a knife. Riester sustained a minor laceration to his left shoulder. Riester then struck

Carpenter in the head with the butt of the pistol. Deputy Sheriff Daniel

Schlernitzauer arrived moments later.

Deputy Schlernitzauer discovered Carpenter lying unconscious on the ground with the knife in his hand. Like Riester, Deputy Schlernitzauer found Carpenter to be exceptionally intoxicated. Deputy Schlernitzauer eventually placed Carpenter under arrest. Carpenter refused to cooperate however, both at Riester's farm and later at the Jessamine County Detention Center. He yelled obscenities, kicked the police cruiser's windows and doors, attempted to strike Deputy Schlernitzauer's hand, and, at one point, attempted to kick Deputy Schlernitzauer's mid-section. To subdue Carpenter, Deputy Schlernitzauer had to use a drive-stun taser on multiple occasions.

Carpenter was charged with a host of crimes, including first-degree wanton endangerment, second-degree assault, third-degree criminal trespass, and operating a motor vehicle under the influence of alcohol (DUI). He later pleaded guilty to the DUI and assault charges.

On September 9, 2011, Carpenter filed a civil action against Riester, asserting claims of battery and false/unlawful imprisonment. Following a short discovery period, Riester moved for summary judgment. To support his motion, Riester attached his own affidavit, an affidavit issued by Deputy Schlernitzauer, Deputy Schlernitzauer's narrative police report, and portions of Carpenter's deposition testimony. Carpenter has no memory of the night in question. To counter Riester's affidavits, Carpenter attached to his responsive motion Deputy

Schlernitzauer's uniform citation and narrative report along with medical evidence of his head injury; Carpenter submitted no opposing affidavits.

By order entered September 24, 2012, the circuit court granted Riester's motion finding there was no genuine issue of material fact upon which Carpenter could prevail. Carpenter appealed.

II. Standard of Review

A circuit court may enter summary judgment only when there is no genuine issue of material fact and the movant is entitled to prevail as a matter of law. *Payne v. Rutledge*, 391 S.W.3d 875, 878 (Ky. App. 2013). When reviewing a summary judgment order, only legal questions and the existence, or non-existence, of material facts are considered. *Stathers v. Garrard County Bd. of Educ.*, 405 S.W.3d 473, 478 (Ky. App. 2012). Our review is *de novo*. *Id.*

“The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present” evidence establishing a triable issue of material fact. *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001). That is, “[t]he 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).

III. Analysis

Carpenter’s position on appeal is that genuine issues of material fact preclude the entry of summary judgment in Riester’s favor. We will address separately Carpenter’s battery and unlawful imprisonment claims.

A. Battery

“Battery is any **unlawful** touching of the person of another, either by the aggressor, or by any substance set in motion by him or her.” *Andrew v. Begley*, 203 S.W.3d 165, 171 (Ky. App. 2006) (emphasis added). “[I]ntent to make contact with the person” is an essential element of civil battery. *Vitale v. Henchey*, 24 S.W.3d 651, 657 (Ky. 2000).

It is undisputed, in the case before us, that Riester struck Carpenter in the head with the butt of his pistol. However, Riester claims his conduct was lawful because he acted in self-defense. In support, Riester points to Kentucky Revised Statutes (KRS) 503.050, which provides that “[t]he use of physical force by a defendant upon another person is justifiable when the defendant believes that such force is necessary to protect himself against the use or imminent use of unlawful physical force by the other person.” KRS 503.050(1).¹ Riester’s position is sound.

Riester submitted an affidavit in which he stated that Carpenter’s knife attack caused him to fear for his life and he struck Carpenter solely in self-defense. Riester claimed to have hit Carpenter only one time, and then moved away.

¹ Although this statute provides justification “in defense of criminal charges for use of physical force, the same principles apply to” Carpenter’s claim of civil battery. *Fultz v. Whittaker*, 261 F. Supp. 2d 767, 783 (W.D. Ky. 2003).

Riester further indicated that he believed physical force to be necessary to protect himself against Carpenter's unjustified knife attack and to avoid imminent danger.

Carpenter identifies no evidence contradicting Riester's affidavit statements that he justifiably used force against Carpenter in self-defense. A party opposing summary judgment must "show [their] hand, or enough of it to defeat the motion, before trial on the merits." *Barton v. Gas Service Co.*, 423 S.W.2d 902, 905 (Ky. 1968).

When the moving party has presented evidence showing that despite the allegations of the pleadings there is no genuine issue of material fact, *it becomes incumbent upon the adverse party to counter that evidentiary showing by some form of evidentiary material reflecting that there is a genuine issue pertaining to a material fact.*

Neal v. Welker, 426 S.W.2d 476, 478 (Ky. App. 1968) (emphasis added). Absent such evidence, the trial court correctly found that Riester, as a matter of law, did not use unlawful force against Carpenter. Riester was certainly justified in using reasonable physical force to protect himself against Carpenter's unexpected and perilous knife attack. Summary judgment was appropriate.

Carpenter contends a genuine issue exists regarding the location of the knife attack, thereby precluding summary judgment. Carpenter points to Riester's affidavit, in which Riester claims the attack occurred at Riester's house after Riester called 911, and his contradictory statements to law enforcement, contained in Deputy Schlernitzauer's police report, that the attack occurred while Riester was transporting Carpenter to his house, before he called 911. We agree that a genuine

issue exists as to this issue. We do not agree, however, that this issue is *material* to whether Riester unlawfully touched Carpenter.

“What is a material fact is determined by the substantive law of the case.” *Nork v. Fetter Printing Co.*, 738 S.W.2d 824, 827 (Ky. App. 1987); *Major v. Commonwealth*, 177 S.W.3d 700, 714 (Ky. 2005). Here, the facts relating to the contact between Carpenter and Riester are entirely undisputed. Carpenter attempted and succeeded in harming Riester with a knife, and Riester responded by striking Carpenter in the head with the butt of his pistol. The location of the altercation is simply irrelevant to whether Riester committed battery.

Carpenter also contends a genuine issue exists concerning whether Riester struck him one time or multiple times with his weapon. Carpenter points out that, in his affidavit attached to his summary-judgment motion, Riester claims he only struck Carpenter one time. However, Carpenter claims that Deputy Schlernitzauer testified during the criminal proceedings that Riester struck him two or three times. Unfortunately for Carpenter, the record of the criminal proceeding was never introduced or made part of *this* record at the trial level. “[O]ur review is limited to the pleadings and evidence considered by the circuit court[.]” *White v. White*, 883 S.W.2d 502, 505 (Ky. App. 1994). We decline to consider evidence outside the record. *Id.*

B. False Imprisonment

The tort of false imprisonment requires the plaintiff to establish he was unlawfully detained. *Birdsong v. Wal-Mart Stores, Inc.*, 74 S.W.3d 754, 757 (Ky.

App. 2001); *Dunn v. Felty*, 226 S.W.3d 68, 71 (Ky. 2007) (explaining “[f]alse imprisonment is the intentional confinement” of a person). “[T]here are two points requisite: (1) The detention of the person, and (2) the unlawfulness of such detention.” *Great Atlantic & Pacific Tea Co. v. Smith*, 281 Ky. 583, 136 S.W.2d 759, 767 (1939).

It is undisputed that Riester detained Carpenter. According to Riester’s own statements, Carpenter attempted to leave on several occasions – both immediately after the truck collision and later while waiting in Riester’s truck for law enforcement to arrive – and Riester prevented him from doing so. *See Banks v. Fritsch*, 39 S.W.3d 474, 479 (Ky. App. 2001) (explaining “any deprivation of the liberty of one person by another or detention for however short a time without such person’s consent and against his will, whether done by actual violence, threats or otherwise” amounts to a false imprisonment). Accordingly, the issue before us is whether it was appropriate for the circuit court to rule by summary judgment that Carpenter’s detention was not unlawful. Riester argues, as a matter of law, that the detention was lawful because he acted in accordance with KRS 503.100(1). That statute states that:

(1) The use of physical force by a defendant upon another person is justifiable when the defendant believes that such force is immediately necessary to prevent such other person from:

(a) Committing suicide or inflicting serious physical injury upon himself; or

(b) Committing a crime involving or threatening serious physical injury to person, substantial damage to or loss of property, or any other violent conduct.

KRS 503.100(1).² “Physical force” is defined as “force used upon or directed toward the body of another person *and includes confinement.*” KRS 503.010(4) (emphasis added).

In his affidavit, Riester stated that: (i) Carpenter drove his vehicle through Riester’s farm gates, destroying them; (ii) Carpenter deliberately drove his vehicle head on into Riester’s vehicle, causing damages; and (iii) Carpenter was grossly intoxicated to the point that he was unable to stand. Riester was concerned for Carpenter’s safety and the safety of others because of Carpenter’s degree of intoxication. He stated he detained Carpenter to prevent him from getting back on the road, potentially doing injury or damage to himself, others, or property.

Again, the party opposing summary judgment must present “at least some affirmative evidence showing that there is a genuine issue of material fact for trial.” *Lewis*, 56 S.W.3d at 436. Carpenter offered no evidence to counter Riester’s affidavit. In fact, the police reports attached to Carpenter’s response actually bolster Riester’s position. Carpenter simply failed to satisfy his burden of creating a genuine issue of material fact. In light of Riester’s uncontradicted affidavit statements, we agree with the circuit court that, as a matter of law, Riester’s detention of Carpenter was not unlawful. It cannot be argued that a

² Again, as referenced in footnote one, the principles contained in this “justification in defense of criminal charges” is applicable to Carpenter’s tort-based claim of unlawful imprisonment. *Fultz*, 261 F. Supp. 2d at 783.

person in an advanced state of intoxication who gets behind the wheel of a motor vehicle does not present the real possibility of causing serious physical injury to himself or another person, and/or substantial damage to property. Accordingly, no action for false imprisonment can be maintained in this case. Summary judgment was appropriate.

IV. Conclusion

We affirm the Jessamine Circuit Court's September 24, 2012 order.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Kimberlyn Carpenter, *Pro se*
Lancaster, Kentucky

BRIEF FOR APPELLEE:

William Miles Arvin
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