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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001927-MR

ANDREW HOWELL — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARTIN F. MCDONALD, JUDGE
ACTION NO. 10-CI-008012

RYAN KESSLING AND
JOSH BYROM — APPELLEES

OPINION
AFFIRMING IN PART, REVERSING IN PART
AND REMANDING

** ** ** ** **

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

JONES, JUDGE: Andrew Howell appeals from the judgment of the Jefferson Circuit Court granting summary judgment in favor of Appellees, Ryan Kessling and Josh Byrom.[1] For the reasons more fully explained below, we affirm the

[1] The Granville Inn is no longer a party to this action.

Jefferson Circuit Court's judgment in favor of Ryan Kessling, but reverse and remand as related to Josh Byrom.

I. BACKGROUND

It is undisputed that Andrew Howell, Ryan Kessling, and Josh Byrom were patrons at the Granville Inn, a bar in Louisville, Kentucky, on the night of November 19, 2009. Kessling and Byrom, members of the University of Louisville football team, were part of a larger group that was socializing at the bar that evening. Howell was part of another group.

At some point in the evening, a verbal confrontation inside the Granville Inn turned physical and soon involved several patrons. The fighting escalated and spilled out onto the sidewalk. Kessling and Byrom admit that they were involved in the fighting both inside and outside of the bar.

Although Howell denied being involved in the fighting, it is undisputed that he ended up outside the bar as the fighting continued on the sidewalk. At some point during the fighting, an individual struck Howell in the side of the head, knocking him to the ground where his head struck the sidewalk. He was rendered unconscious and witnesses observed that he was bleeding from his head. Someone called the police and Howell was taken the hospital. He was subsequently diagnosed with severe injury and trauma to his brain. No criminal charges were filed as related to the fight or Howell's injuries.[2] Howell does not recall who struck him.

[2] There was a police investigation into the matter that named Kessling and Byrom as suspects. However, no formal charges were ever brought in relation to the assault.

Kessling and Byrom deny striking Howell. They admit, however, that they were involved in the fighting that evening and that they fled the scene after Howell was struck because they were concerned that they would get into trouble for drinking and fighting.

Howell filed a complaint on November 16, 2010, against Kessling and Byrom alleging assault and battery. Following some discovery, Kessling filed a motion for summary judgment on June 2, 2011. Howell responded that summary judgment was premature as there were still several depositions that needed to take place as well as other additional discovery to be conducted. The trial court agreed and denied the motion for summary judgment as premature.

Throughout the next year, the parties continued with discovery, which included depositions of Kessling and Byrom and a third individual, Stefan Harpe, an eyewitness.

In their depositions, Kessling and Byrom testified consistent with their prior assertions that they did not deliver the punch that caused Howell to fall and strike his head on the concrete.

On July 18, 2011, Howell's counsel took Harpe's deposition. Harpe was also present at the Granville Inn on the night in question. Harpe testified that he witnessed Howell getting punched and then falling to the ground. He further testified that while Howell and Byrom were initially scuffling, Byrom was not the individual who delivered the blow that knocked Howell to ground. After reviewing photographs of both Byrom and Kessling, Harpe testified that the person

who hit Howell was smaller than either of the defendants and had dark hair. Harpe did not identify this individual by name.

Kessling also filed the affidavit of Christian J. Marinacci. Marinacci averred that he was present at the Granville Inn on the night in question and was socializing with a group of individuals which included Howell. Marinacci further averred that he was fighting with Kessling at the time that Howell was struck and was certain that Kessling was not the individual who struck Howell. Specifically, he averred: "I am sure it was not Ryan Kessling who caused Andrew Howell to fall and hit his head because Ryan Kessling was standing next to me at the time and was nowhere near Andrew Howell."

After completion of the additional discovery, Kessling filed a renewed motion for summary judgment on April 16, 2012. Howell's counsel once again argued that summary judgment was premature as additional depositions were necessary. Based on this assertion, the trial court entered a scheduling order on May 10, 2012, reserving the motion and allowing counsel until June 15, 2012, to take additional depositions. The trial court further allowed each party until June 29, 2012, to advise the court of his position on the motion based on the new depositions. The court also stated that "if no witness identifies one or both of the Defendants as Howell's assailant, the Court will grant summary judgment to those Defendants not identified as having been involved in the matter."

The parties did not take any additional depositions or exchange any additional discovery. However, on June 29, 2012, Howell filed a response to the summary judgment motion, to which he attached an affidavit from a new witness, Shannon Watts. Watts averred as follows:

> On November 19, 2009, I was present at the Granville Inn in Louisville, Kentucky. I personally observed the events that took place inside and outside the bar that night. I personally witnessed Andrew Howell get struck by an individual involved in the fighting. I saw a really large guy with pale skin and light colored hair strike Andrew with his fist. Immediately afterwards, I observed another large guy with tanned skin go to the assailant and motion for him to follow him down the sidewalk. I observed the two large guys hurrying down the sidewalk toward campus. I am absolutely certain that there were only two guys walking away on the sidewalk. I am absolutely positive that one of the guys walking away on the sidewalk was the individual that I witnessed strike Andrew Howell.

Thereafter, the trial court entered summary judgment in favor of Byrom and Kessling on July 11, 2012.[3] Howell filed a timely motion to vacate, which was denied. It is from these orders that Howell now appeals.

II. Standard of Review

Pursuant to Kentucky Rules of Civil Procedure (CR) 56.03, summary judgment shall be granted if "the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that

[3] In its entirety the trial court's summary order states: "IT IS HEREBY ORDERED that Summary Judgment should be awarded to Defendants, RYAN KESSLING and JOSHUA BYROM, as set out in their previous Summary Judgments and Order of Court."

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."

The party moving for summary judgment 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 "at least some affirmative evidence showing that there is a genuine issue of material fact for trial." *Lewis v. B & R Corp.,* 56 S.W.3d 432, 436 (Ky. App. 2001) (quoting *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991)).

When reviewing a motion for summary judgment, a trial court must be mindful that its role is to determine whether disputed material facts exist; it is not to decide factual disputes. As our Supreme Court recently reminded us:

> Summary judgment is to be "cautiously applied and should not be used as a substitute for trial." Granting a motion for summary judgment is an extraordinary remedy and should only be used "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 and against the movant." The trial court must review the evidence, not to resolve any issue of fact, but to discover whether a real fact issue exists.

Shelton v. Kentucky Easter Seals Soc., Inc., 413 S.W.3d 901, 905 (Ky. 2013) (internal citations omitted).

Because summary judgment involves no fact-finding by the trial court, we accord no deference to the trial court's decision; our review is *de novo*. *See Davis v. Scott*, 320 S.W. 3d 87, 90 (Ky. 2010) (citing 3D *Enterprises*

Contracting Corp. v. Louisville and Jefferson County Metropolitan Sewer Dist., 174 S.W.3d 440, 445 (Ky. 2005)).

III. Analysis

The relevant evidence comes from six individuals present at the Granville Inn on the night in question: Howell, Kessling, Byrom, Harpe, Marinacci, and Watts.[4]

Howell has no recollection of the events; he cannot identify the individual who delivered the blow that caused his injuries.

Kessling and Byrom deny delivering the blow in question.

Harpe testified that Byrom was not the individual who struck Howell before he fell.[5] Harpe described the person who actually struck Howell as close to six feet tall and wearing a gray shirt, describing him as a significantly smaller man than Byrom. The University of Louisville's 2009 football roster lists Kessling as 6'5" tall and weighing 285 pounds and Byrom as 6'5" tall and weighing 305 pounds.

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[4] Kessling and Byrom contend that we should not consider Watts's affidavit because the court's scheduling order referenced only depositions, and therefore, precluded submission of proof by any alternative means. We are not persuaded by this interpretation of the order. While the court's order was clearly intended to encourage the parties to gather additional evidence through deposition, it did not actually require such depositions, nor did it state that the court would make its decision based solely on the depositions. Furthermore, CR 56.03 specifically states that affidavits shall be part of the evidence considered prior to summary judgment. *See also* *Collins v. Duff*, 283 S.W.2d 179 (Ky. 1955) (holding that in ruling on a motion for a summary judgment the court may consider any evidence that has been presented at any stage of the proceedings).

[5] Harpe's deposition confirms that he originally mistook Byrom for Kessling.

Marinacci averred that he did not see who struck Howell, but is certain that it was not Kessling because he was fighting with Kessling at the time and they were not in close enough proximity to Howell for Kessling to have hit him. Byrom attempts to place himself with Marinacci and Kessling, about "15 feet" away when Howell was hit, but other witnesses contradict him. Furthermore, Marinacci himself said that, contemporaneously with Howell's fall to the pavement, he "saw Josh Byrom within five feet of Andrew Howell."

Stefan Harpe stated in an affidavit that he "witnessed a physical confrontation between Andrew Howell and an extremely large man [during which both were] throwing punches." In deposition, Harpe became much more specific. After being shown a picture of Byrom, he was asked whether the following description of what he saw was correct:

> Josh Byrom was the person involved in a scuffle, for lack of a --for--for a nice easy way to put it, with Mr. Howell. And that Mr.--at the same time, Mr. Kessling and Mr. Marinacci were involved in another scuffle. Does that sound fair?

(Stefan J. Harpe deposition, July 15, 2011, pp. 33-34). Harpe said that was "a fair statement." Then pointing to the picture of Byrom, Harpe said, "[T]his was the guy (indicating) who was initially involved with Andrew."

Furthermore, although the fight at the bar had gone on for some time, it was not until after Howell had been struck that Byrom decided it was time to leave. According to Kessling's description of the end of his scuffle with Marinacci, he "managed to get free from the headlock or [Marinacci] let [] go[.]" (Ryan

Kessling deposition, pp. 71-72). Kessling then saw a woman known to Byrom and Kessling named "Danielle holding [Howell] on the ground[.] . . . She was screaming, somebody get help." (*Id.*) Neither Kessling nor Byrom joined their friend Danielle in obtaining that help. Rather, when Byrom reached Kessling and "helped [him] off of the ground . . . at that point Josh was standing there saying we need to go, and we left at that point." (*Id.*) It has been said that "flight is always some evidence of a sense of guilt." *Day v. Commonwealth*, 361 W.W.3d 299, 303 (Ky. 2012) (internal quotations marks and citation omitted). It seems to us that it could be some evidence here as well.

Both Kessling and Byrom contradicted themselves regarding where they went after leaving the bar and whether they were accompanied by a third person. But Shannon Watts "[s]aw a really large guy with pale skin and light colored hair strike Andrew with his fist." She then saw that same man and one other "large guy[] hurrying down the sidewalk toward campus [and she][was absolutely positive that there were only two guys[.]" (Watts affidavit, p. 1). Whether she could identify Byrom as the perpetrator has yet to be tested, but that does not seem "impossible" as that term is used in summary judgment analysis.

Having reviewed the evidence, we agree with the trial court that there appears to be no genuine issue that Ryan Kessling was not close enough to Howell to have struck the blow that injured him. Accordingly, we affirm the circuit court's judgment in favor of Kessling. However, we cannot agree that the evidence rendered it impossible for Howell to prove at trial that Byrom delivered the blow at

issue. Therefore, we reverse the circuit court's judgment in Byrom's favor and remand this matter for additional proceedings consistent with this opinion.

ACREE, CHIEF JUDGE, CONCURS.

KRAMER, JUDGE, CONCURS IN PART, DISSENTS IN PART AND FILES A SEPARATE OPINION.

KRAMER, JUDGE, CONCURRING AND DISSENTING IN PART: Respectfully, I dissent from the majority's opinion as related to Kessling. I agree this is a close case on the identification of tortfeasor. Nonetheless, given the facts of this case when viewed in favor of Howell -- particularly the affidavit of Shannon Watt -- I believe genuine issues of material fact exist sufficient that it is not *impossible* for Howell to prevail at trial. *Steelvest Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 483 (Ky. 1991) (quoting *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985)). As the Kentucky Supreme Court has stated, "Impossible" is to be used in "a practical sense, not in an absolute sense." *Perkins v. Hausladen*, 828 S.W.2d 652, 654 (Ky. 1992). Accordingly, I would let this case go to the fact-finder for resolution.

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