

RENDERED: JANUARY 24, 2014; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2012-CA-001943-MR

RITA BARRETT, IN HER  
CAPACITY AS ADMINISTRATRIX  
OF THE ESTATE OF LARRY  
TIMOTHY BARRETT, DECEASED;  
RITA BARRETT, INDIVIDUALLY;  
AND NICHOLAS BARRETT, A MINOR,  
BY AND THROUGH HIS MOTHER AND  
NEXT FRIEND, RITA BARRETT

APPELLANTS

v. APPEAL FROM JACKSON CIRCUIT COURT  
HONORABLE OSCAR G. HOUSE, JUDGE  
ACTION NO. 09-CI-00202

ELMO GREER & SONS, LLC,  
A KENTUCKY LIMITED LIABILITY  
COMPANY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ACREE, CHIEF JUDGE; COMBS AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Rita Barrett, in her capacity as administratrix of the estate of Larry Timothy Barrett, deceased; Rita Barrett, individually, and Nicholas Barrett, a minor, by and through his mother and next friend, Rita Barrett (collectively referred to as the Estate) bring this appeal from an October 24, 2012, summary judgment of the Jackson Circuit Court dismissing the Estate's negligence action against Elmo Greer & Sons, LLC, (Greer) a Kentucky limited liability company. We affirm.

The decedent, Larry Timothy Barrett, was involved in a single motor vehicle accident. This one-vehicle accident occurred at the intersection of Ky. Hwy. 3444 and the new Ky. Hwy. 30 on March 7, 2009. At the time of the accident, the road was under construction by Greer in connection with its contract with the Kentucky Department of Transportation to construct the new Ky. Hwy. 30. The facts underlying Barrett's motor vehicle accident were succinctly set forth by the circuit court as follows:

Viewing the facts in light most favorable to the [Estate] Mr. Barrett left a friend's home on the early morning hours of March 7, 2009. Mr. Barrett had been at the friend's home the evening before at a party. According to the testimony of Shane York, Mr. Barrett was observed leaving his friend's house at approximately 4:30 a.m. Mr. York turned and followed Mr. Barrett on KY 30 through Annville. Mr. York testified he was traveling 60 to 65 mph in a 35 mph zone, but was not able to catch up to Mr. Barrett. Using a short cut, Mr. York was able to get in front of Mr. Barrett's direction of travel, and parked his vehicle near the intersection of KY 3444. Mr. Barrett did not slow or stop where Mr. York was parked, but instead turned onto KY 3444. Mr. York turned to follow Mr. Barrett. Mr. York saw Mr. Barrett's

headlights go into the air. He then continued to the scene of the accident and saw Mr. Barrett's vehicle on the embankment. Mr. Barrett had apparently been ejected through the sunroof and landed on the roadway where he suffered fatal injuries.

Consequently, the Estate filed a complaint against Greer alleging:

6. Defendant Greer negligently caused the road surface at the accident site to be torn up and had to put a composite surface on the road resulting in numerous large pot holes in the roadway at the accident site.

7. Defendant Greer negligently failed to maintain adequate signage to warn drivers of the unsafe condition of the roadway.

8. Defendant Greer's actions were willful, wanton, and grossly negligent, for which punitive damages are recoverable.

9. The injuries and subsequent death of the deceased, . . . , were a direct and proximate result of the aforesaid negligence of Defendant Greer.

Greer ultimately filed a motion for summary judgment arguing that the Estate failed to set forth a *prima facie* case of negligence. In particular, Greer maintained that the Estate failed to prove that the potholes or condition of the road was the legal cause of Barrett's motor vehicle accident. The circuit court agreed and rendered summary judgment dismissing the Estate's complaint in its entirety. This appeal follows.

The Estate contends that the circuit court erred by rendering summary judgment dismissing the complaint against Greer. Specifically, the Estate argues that sufficient evidence was presented to create a material issue of fact upon

causation of the accident. The Estate maintains that based upon the sheer numbers of potholes in the road and the distance Barrett's motor vehicle traveled up the adjoining embankment at the time of his crash, the jury could infer that Barrett's vehicle hit a pothole that caused him to lose control of the vehicle. In particular, the Estate points to the opinion of its expert, R. Vince Sayre, a professional engineer. Sayre opined that the road was poorly maintained and hazardous. He inspected the road on March 23, 2009, which was some sixteen days after the accident. If the potholes were present at the time of the accident on March 7, 2009, Sayre stated that it was probable that Barrett's vehicle hit a pothole that caused him to lose control, thereby causing the accident. For the following reasons, we conclude that the circuit court properly determined that the Estate failed to create a material issue of fact upon the issue of causation.

Summary judgment is proper where there exists no material issue of fact and movant is entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure 56; *Steevest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). When considering summary judgment, all evidence and reasonable inferences therefrom are to be viewed in a light most favorable to the nonmoving party. *Steevest, Inc.*, 807 S.W.2d 476.

To succeed upon a claim of negligence, plaintiff must prove the elements of duty, breach of duty, causation, and damages. *See Baylis v. Lourdes Hosp., Inc.*, 805 S.W.2d 122 (Ky. 1991). Relevant to this appeal is the element of causation.

In this Commonwealth, we have adopted the legal causation standard set forth in the Restatement (Second) of Torts § 431 (1965):

The actor's negligent conduct is a legal cause of harm to another if

(a) his conduct is a substantial factor in bringing about the harm, and

(b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm.

*See CertainTeed Corp. v. Dexter*, 330 S.W.3d 64 (Ky. 2010). Thus, to prove causation, plaintiff must establish that the breach of duty was a substantial factor in causing the damage.

In this case, there were no eyewitnesses to the accident. So, the evidence produced by the Estate was necessarily circumstantial. Circumstantial evidence is ordinarily sufficient to create a submissible issue of fact for the jury. Circumstantial evidence is generally defined as “[t]he proof of certain facts . . . , from which a jury may infer other connected facts which usually and reasonably follow . . . .” *Black’s Law Dictionary* 243 (6th ed. 1990). Therefore, the jury may infer the existence of a fact from the direct evidence of another fact. Such inferred fact from an established fact in the record is entirely permissible. Yet, it has long been recognized that an inference (or inferred fact) may not be based upon another inference (or another inferred fact):

It is not sufficient, therefore, to present a number of circumstances about which one might theorize as to the cause of the accident. Where it is sought to base an

inference on a certain alleged fact, the fact itself must be clearly established. If the existence of such a fact depend on a prior inference, no subsequent inference can legitimately be based upon it.’

.....

‘An inference may be drawn from a clearly established fact, but, if the conclusion is drawn upon a fact dependent for proof of its existence upon a prior inference, the evidentiary fact is too remote to support the conclusion.’

*Briner v. General Motors Corp.*, 461 S.W.2d 99, 102 (Ky. 1970) (citations omitted).

To prove causation in this case, the Estate must demonstrate that: (1) potholes existed upon the road, (2) Barrett’s motor vehicle hit a pothole, and (3) upon hitting the pothole, Barrett lost control of the motor vehicle leading to the accident. Viewing the facts most favorable to the Estate, we note that the Estate presented evidence establishing the existence of numerous potholes in the road where the accident occurred. From such established fact, it would be permissible and reasonable for the jury to infer that Barrett’s motor vehicle may have hit a pothole on the night in question. Such an inference would be based upon the established fact that numerous potholes where present in the road. Yet, to prove causation, the jury must additionally infer that after hitting the pothole Barrett lost control of his vehicle, thus causing the accident. The second inference, that Barrett lost control after hitting the pothole, is impermissible as it is based upon a prior inference, that Barrett’s motor vehicle hit a pothole. Simply put, it is an inference

based upon an inference. For this reason, we do not believe that the Estate created a material issue of fact as to causation.

Based upon the same reasoning as set forth above, we, likewise, conclude that no material issue of fact exists upon whether failure to maintain road signs as a warning was a substantial factor in causing the accident. The Estate simply failed to establish a material issue of fact upon causation, and based upon the facts presented by the Estate, the cause of the accident is mere speculation at best.

In sum, we hold that the circuit court properly rendered summary judgment dismissing the Estate's complaint in its entirety.

For the foregoing reasons, the summary judgment of the Jackson Circuit Court is affirmed.

ACREE, CHIEF JUDGE, CONCURS.

COMBS, JUDGE, CONCURS IN RESULT ONLY.

BRIEFS FOR APPELLANT:

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