

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000167-MR

SHARON EMBRY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 11-CI-001283

STATE FARM MUTUAL AUTOMOBILE
INSURANCE CO., AS SUBROGEE OF JOAN BAXTER

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: JONES, STUMBO AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Sharon Embry appeals from an opinion and order granting summary judgment and the order denying her motion pursuant to CR 60.02 for relief from the grant of summary judgment.

On July 27, 2009, a motor vehicle driven by Embry and a vehicle driven by Joan Baxter collided. Embry was uninsured. Baxter, who was insured by State Farm Mutual Automobile Insurance Company, made a claim under her

policy for the damage to her vehicle and medical expenses. State Farm paid her claim in the amount of \$15,311.58.

On February 18, 2011, State Farm, as subrogee, filed suit against Embry seeking to recover the amount it paid Baxter. State Farm alleged Embry negligently operated a motor vehicle resulting in damage to Baxter's motor vehicle and personal injury to the occupants of that vehicle.

Embry has consistently denied these allegations through her answer, response to requests for admission and answers to interrogatories. In Embry's response to the requests for admission, Embry denied Baxter had the right of way, denied she was negligent, denied the amount of damages and denied she was liable for damages.

Embry's relevant responses to the requests for admission are as follows:

7. Immediately prior to the subject collision, Plaintiff's Insured's Vehicle had the right of way, as Plaintiff's Insured's Vehicle was already in the turn lane in the process of making her turn.

ANSWER: Deny.

8. Plaintiff's Insured As a direct and proximate result of Defendant Sharon A. Embry's negligence, Defendant caused a collision involving Plaintiff's Insured Vehicle.

ANSWER: Deny.

9. As a direct and proximate result of Defendant Sharon A. Embry's negligence, Plaintiff's Insured sustained damages in the amount of \$15,311.58.

ANSWER: Deny.

In Embry's answers to interrogatories she denied all liability and the reasonableness of damages.

Embry's relevant answers to interrogatories are as follows:

12. Identify any information which you believe tends to show that the damages claimed by Plaintiff were caused or contributed to by any negligent act or omission on the part of any party not named as a Defendant in this suit and identify said party and describe the nature of such negligent act or omission.

ANSWER: Joan Baxter, was improperly passing at the time of the collision.

13. If Defendant believes that Defendant is not responsible for the damages claimed by Plaintiff in this matter, describe in complete detail why Defendant so believes.

ANSWER: Ms. Baxter was far enough back, at least 4-5 car lengths, to have enough time to see my turn signal on and see that I was merging into the center median. The Defendant also contests the reasonableness and necessity of medical treatment and property damage claims.

...

16. State, in detail, Defendant's recollection of the incident and how it occurred.

ANSWER: It was around lunchtime and I was heading north on National Turnpike to Dairy Queen. When traffic was backing up due to a train that was stopped blocking both sides of National Turnpike. As I sat there for a good 10-15 minutes and the train still hadn't moved, I decided to proceed into the center median to turn with my turn signal on. I was moving about 3-5 mph. I looked out my side mirror to see if anyone was coming. I saw Ms. Baxter 4-5 cars behind me so I decided to proceed my merge into the median. When I was hit by Ms. Baxter, which was going about 20 mph, the Plaintiff

hit me again to get further into the center lane. I then got out of my car to see the damage of my car. Joan Baxter, got out walking behind her car waiting for the police to arrive. Once the police finally arrived the officer talked to me first, then talked to the occupant's of the other vehicle which were both standing and walking with no problems. The officer then proceeded to give us both a number to call later for the police report. The occupants of the other vehicle returned to their car and left. I had to stay and wait for a wrecker because I couldn't drive my car and had it towed back to my house. It took about a month to get the police report and during that time, no one reached out to me about anything.

State Farm filed a motion for summary judgment, arguing liability and damages could not be disputed. Embry opposed the motion, stating numerous issues of material fact precluded summary judgment, including whether Embry or Baxter was at fault and whether the compensation paid to Baxter was reasonable. Embry specifically referenced her answers to interrogatories as supporting her contention that liability was contested.

The circuit court granted the motion for summary judgment, explaining its decision as follows:

State Farm has produced the police report recording the officer's contemporaneous observations. It has produced the sworn testimony of its insured and its claims representative, as well as copies of all the billing statements. As this testimony remains uncontroverted, Embry has simply made the bald assertion that there are genuine issues of material fact without having produced any affirmative evidence to support that position. Under these circumstances, summary judgment is appropriate.

Embry filed a motion to alter, amend or vacate the opinion and order granting summary judgment pursuant to CR 60.02. She argued the circuit court

was incorrect that she failed to provide evidence that liability was contested because she denied liability in both her answers to requests for admission and in her answers to interrogatories, the police report was not contemporaneous or admissible and she should be afforded an opportunity to contest damages. The circuit court denied Embry's CR 60.02 motion.

Embry appealed from both the opinion and order granting summary judgment and the order denying her motion for relief pursuant to CR 60.02. Because we review the grant of summary judgment directly, we do not address whether the circuit court erred in failing to grant Embry's CR 60.02 motion.

Summary judgment should be granted "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 a judgment as a matter of law." CR 56.03 (emphasis added). Granting of a summary judgment motion "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.'" *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 483 (Ky. 1991) (quoting *Paintsville Hospital Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985)).

Embry met her burden as the opposing party by contradicting State Farm's proof that liability and damages could not be disputed through her detailed sworn answers to interrogatories that were part of the record. *See Id.* at 482; *Cont'l Cas.*

Co. v. Belknap Hardware & Mfg. Co., 281 S.W.2d 914, 916 (Ky. 1955). As a participant in the accident, her answers about her observations as to how the accident occurred, the cause of damages and the physical condition of Baxter and her passenger afterward, were sufficient to raise material issues of fact. *Compare with O'Bryan v. Cave*, 202 S.W.3d 585, 587-588 (Ky. 2006). There is no requirement that Embry's statements be restated in the form of an affidavit to be sufficient to defeat a motion for summary judgment. Whether Embry's account or Baxter's account should be believed is a question for the jury. We conclude the circuit court erred in determining that there were no material issues of fact remaining and granting summary judgment.

Accordingly, we reverse and remand the Jefferson Circuit Court's opinion and order granting summary judgment.

ALL CONCUR.

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