

RENDERED: JANUARY 9, 2015; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2013-CA-000772-MR

PEGGY GILBERT

APPELLANT

v. APPEAL FROM SCOTT CIRCUIT COURT  
HONORABLE ROBERT G. JOHNSON, JUDGE  
ACTION NO. 10-CI-00879

U-HAUL INTERNATIONAL INC.;  
JUDD ROAD STORAGE AND U-HAUL;  
AND THOMAS GILBERT

APPELLEES

OPINION  
AFFIRMING

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BEFORE: CAPERTON,<sup>1</sup> COMBS, AND VANMETER, JUDGES.

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<sup>1</sup> Judge Caperton authored this opinion prior to Judge Debra Lambert being sworn in on January 5, 2015, as Judge of Division 1, Third Appellate District. Release of this opinion was delayed by administrative handling.

CAPERTON, JUDGE: Appellant Peggy Gilbert appeals the order of the Scott Circuit Court granting summary judgment for her husband, Tom Gilbert. Finding no error, we affirm.

This action arises from a single-vehicle collision that occurred while Tom was driving a truck with a U-Haul trailer attached. Tom attempted to brake while driving on a grade and struck a highway median wall. Peggy, who was in the front passenger seat, was injured in the collision.

Peggy filed claims against Tom, the company through which they rented the trailer (Judd Road Storage and U-Haul) and the manufacturer of the trailer (U-Haul International, Inc.). Peggy testified in her deposition that she did not observe Tom driving incorrectly or inappropriately. All three Appellees filed motions for summary judgment.

During the first hearing, the trial court allowed Peggy four months to obtain additional evidence to overcome summary judgment. At the second hearing, the only additional proof Peggy produced was the affidavit of Robert Miller, a former police officer who specializes in accident reconstruction. The affidavit stated that he had reviewed the records and the accident could only have been caused by error on the part of Tom, U-Haul, or both.

The claims against Judd Road and U-Haul were subsequently settled. The only issue on appeal is whether summary judgment as to the claim against Tom was proper.

S.W.3d 188 (Ky. App. 2006), outlines the standard for reviewing summary judgments.

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 respondent to produce evidence at the trial warranting a judgment in his favor. On appeal, this Court must determine whether the trial court erred in concluding that there was no genuine issue as to any material fact and that the moving party was entitled to a judgment as a matter of law. Because summary judgments involve no fact finding, this Court reviews them *de novo*, in the sense that we owe no deference to the conclusions of the trial court.

*Id.* at 189 (citations omitted). We review this matter to assess whether Peggy presented a genuine issue of material fact and whether Tom was entitled to a judgment as a matter of law.

Recovery for negligence requires establishment of the elements of duty, breach of duty, causation, and damages. *See, e.g., Lewis v. B & R Corp.*, 56 S.W.3d 432, 436–37 (Ky. App. 2001). Peggy argues that a genuine issue of material fact exists simply because Tom was unable to control the vehicle. But Tom’s failure to maintain control of the vehicle, when taken alone, is not enough to show negligence absent the application of *res ipsa loquitur*. The doctrine of *res ipsa loquitur* “recognizes that as a matter of common knowledge and experience the very nature of an occurrence may justify an inference of negligence on the part of the person who controls the instrumentality causing the injury.” *Bell & Koch, Inc. v. Stanley*, 375 S.W.2d 696, 697 (Ky. 1964).

The case of *Cox v. Wilson*, 267 S.W.2d 83, 84 (Ky. 1954), describes

the elements of *res ipsa loquitur* as follows:

- (1) The defendant must have had full management and control of the instrumentality which caused the injury.
- (2) The circumstances must be such that, according to common knowledge and the experience of mankind, the accident could not have happened if those having control and management had not been negligent.
- (3) The plaintiff's injury must have resulted from the accident.

Here, the first and third elements were clearly shown by the depositions of Peggy and Tom. The focus of our analysis centers on the second element. The court in *Cox*, which similarly discussed the second element of this doctrine, explains:

The fact that some mystery accompanies an accident does not justify the application of the doctrine of *res ipsa loquitur*. The fact that we cannot pinpoint an act of omission or commission wherein one fails to respect the rights of others does not summon its use. A lack of knowledge as to the cause of the accident does not call for the application of the doctrine. The separate circumstances of each case must be considered and from them it must be first decided whether according to common knowledge and experience of mankind, this accident could not have happened if there had not been negligence.

*Id.*

The second element is not satisfied here. The evidence presented to the trial court indicates that the accident could have happened had Tom not been negligent. Tom had recently replaced the tires on the truck and had the brakes inspected, which had approximately sixty percent of their life remaining. Tom

checked the trailer assembly during a rest stop just before the collision. He had Peggy drive the truck a short distance so that he could visually inspect it and deemed it safe to drive. He drove slowly so that he could more effectively control the vehicle.

From his deposition, it appears that Tom has an in-depth understanding of how the mechanism connecting the trailer to the truck operates. Additionally, Peggy indicated during her deposition that she did not observe Tom driving incorrectly or inappropriately throughout the incident. All of these facts indicate that the accident could have been due to some malfunction of the trailer, negligence of the manufacturer, or some other reason outside the reasonable control of Tom. Whatever the true reason for the accident, the possibility that it may have occurred without any negligence on the part of Tom precludes application of the doctrine of *res ipsa loquitur*. The fact that the collision occurred does not justify an inference of negligence.

Alternatively, Peggy argues that a genuine issue of fact arises from the affidavit of Robert Miller. We disagree. The affidavit was conclusory and did not “set forth such facts as would be admissible in evidence” as required by Kentucky Rules of Civil Procedure 56.05. The affidavit merely stated that the accident may have been due to driver error; it provided no additional factual basis upon which Peggy might rely to create a genuine issue of material fact.

As noted above, to recover for negligence, Peggy must establish the elements of duty, breach of duty, causation, and damages. None of the evidence

she submitted established the existence of duty, breach, or causation here. As there was no justification for an inference that Tom was negligent, and the affidavit provided no additional facts, there was no genuine issue of material fact. Tom was entitled to a judgment as a matter of law, and the trial court did not err in granting summary judgment.

The order of the trial court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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