

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2013-CA-001559-MR

BOBBY MILLER

APPELLANT

v. APPEAL FROM LETCHER CIRCUIT COURT  
HONORABLE SAMUEL T. WRIGHT, III, JUDGE  
ACTION NO. 04-CI-00374

CONSOL OF KENTUCKY,  
INC., FORMERLY KNOWN AS  
CONSOLIDATION COAL COMPANY;  
WHAYNE SUPPLY COMPANY; AND  
ALL-TIME TRUCKING, INC.

APPELLEES

OPINION  
AFFIRMING

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BEFORE: KRAMER,<sup>1</sup> LAMBERT, AND NICKELL, JUDGES.

LAMBERT, JUDGE: Bobby Miller appeals from the Letcher Circuit Court's  
August 7, 2013, entry of summary judgment in favor of Consol of Kentucky, Inc.,

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<sup>1</sup> Judge Joy A. Kramer, formerly Judge Joy A. Moore.

All Time Trucking, Inc., and Whayne Supply. After careful review, we affirm the court's entry of summary judgment.

This case arises from a single vehicle automobile accident which occurred on August 6, 2004, on Kentucky State Route 1469 in Letcher County, Kentucky. Miller alleges that while traveling from his home in Pike County, Kentucky, to Taylor Metal Company in Letcher County, he went down a steep incline and encountered approximately 100 feet of an oily, glistening substance on the road. Miller described the substance as looking like oil and water. Miller alleges this substance caused his car to spin, which ultimately caused him to wreck, resulting in serious bodily injury and damage to his vehicle.

Consol maintained mining operations in the area of the accident and had a contractual relationship with All Time Trucking. Pursuant to the contract, All Time Trucking was to deliver water to Consol's mine site in the area of the accident. After the incident, Miller found a five-gallon bucket of transmission fluid in the ditch beside his car. The transmission fluid was Caterpillar brand, which was sold by Whayne Supply, the exclusive distributor of Caterpillar products in Kentucky. Miller also saw an unidentified water truck driving along Kentucky State Route 1469 splashing water onto the roadway after his accident. Miller was not able to say if the truck was an All Time Trucking truck.

In September 2004, Miller filed suit, naming only Consol and "John Doe" as defendants. Over eight months later, on August 2, 2005, after Miller's counsel had withdrawn, he filed an Amended Complaint naming Whayne Supply

as a co-defendant. Consol moved for summary judgment against Miller in June 2006, after Miller had retained new counsel. By this time, more than a year and a half since the lawsuit's filing, Miller had only served a single interrogatory to either Consol or Whayne Supply.

In response to the motion for summary judgment, Miller moved to amend his complaint to name All Time Trucking as a defendant and argued he needed additional time to complete discovery. On November 22, 2006, Consol renewed its motion for summary judgment. All Time Trucking also filed its motion for summary judgment, arguing that Miller had failed to present any evidence demonstrating that it had caused his accident and that there was no evidence in the record to support such an allegation.

Whayne Supply later moved for a status conference, which was held on December 6, 2007. At the status conference, Miller again asked for time to obtain new counsel. The trial court reserved ruling on any of the appellees' pending motions for summary judgment. After obtaining new counsel in April 2008, Miller failed to take any action until after he received a Kentucky Rules of Civil Procedure (CR) 77.02(2) notice indicating that his suit would be dismissed for lack of prosecution unless he could show cause why it should not be dismissed. Miller asked the trial court not to dismiss his action because the appellees had motions for summary judgment pending. The trial court kept Miller's suit on the docket and ultimately scheduled a pretrial conference for September 1, 2012.

However, before this pretrial conference could occur, Miller once again obtained new counsel.

After holding additional hearings, the Letcher Circuit Court entered a pretrial order on October 17, 2012, scheduling a final pretrial conference on February 28, 2013. This order required all discovery and depositions to be completed within 30 days before the pretrial conference. Miller made no effort to obtain additional discovery during this time, and in February 2013, the appellees re-noticed their motions for summary judgment to be heard at the final pretrial conference. The trial court's pretrial order also set deadlines for the filing of witness and exhibit lists and proposed jury instructions. All appellees complied with these deadlines, but Miller did not. The trial court granted the appellees' motions for summary judgment on August 7, 2013. This appeal now follows.

As an initial matter, we note Miller's failure to comply with CR 76.12. That rule provides that an appellant's brief must contain at the beginning of each argument a reference to the record showing whether the issue was preserved for review. *Elwell v. Stone*, 799 S.W.2d 46, 48 (Ky. App. 1990) (quoting *Massie v. Persson*, 729 S.W.2d 448, 452 (Ky. 1987)). Failing to comply with this rule is an unnecessary risk the appellate advocate should not chance. Compliance with CR 76.12 is mandatory. *See Hallis v. Hallis*, 328 S.W.3d 694, 696 (Ky. App. 2010). Although noncompliance with CR 76.12 is not automatically fatal, we would be well within our discretion to strike the brief or dismiss the appeal for Miller's failure to comply with the rules. *Elwell*. While we have chosen not to

impose such a harsh sanction, we caution counsel that such latitude may not be extended in the future.

In his brief to this Court, Miller argues in three short paragraphs that the trial court erred by granting summary judgment in favor of the appellees. He argues that the undisputed evidence is that Consol had contracted with All Time Trucking to provide water for its mine site. As for All Time Trucking, Miller argues that while he was waiting for the police to arrive at the scene of the accident, an All Time Truck drove by, splashing water over the roadway. However, Miller's testimony under oath was that he did not know who the truck was driven by or whether the people in the truck were employed by All Time Trucking. Finally, regarding Whayne Supply, Miller testified that there was an oily substance on the road and upon inspection, he found a five-gallon container of Caterpillar transmission fluid in the ditch at the site of the accident. Whayne Supply is the exclusive dealer of this product, so Miller alleges the oily substance must have originated from Whayne Supply.

Our standard of review is well-settled in the Commonwealth. "The standard of review on appeal when a trial court grants a motion for summary judgment is 'whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.'" *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001), citing *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996); *Palmer v. International Ass'n of Machinists & Aerospace Workers*, 882 S.W.2d 117, 120

(Ky. 1994); CR 56.03. “Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*.” *Lewis*, 56 S.W.3d at 436, citing *Scifres*, 916 S.W.2d at 781; *Estate of Wheeler v. Veal Realtors and Auctioneers, Inc.*, 997 S.W.2d 497, 498 (Ky. App. 1999); *Morton v. Bank of the Bluegrass and Trust Co.*, 18 S.W.3d 353, 358 (Ky. App. 1999).

In the instant case, Miller cannot defeat the motions for summary judgment without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial. We agree that he has failed to do so.

The specific allegation of liability contained in the amended complaint regarding All Time Trucking is that it allowed water to be placed or carried upon the roadway from certain mining operations, resulting in a slick or hazardous roadway. However, many vehicles in addition to those hauling water and coal traveled the route on which Miller was driving and on which the accident occurred. The fact remains that there is no accurate way to determine what vehicle, if any, allowed water and/or other fluids to escape upon the roadway and in what amounts. In the absence of any such evidence, any decision by a jury as to who permitted water or other fluids to be placed on the roadway would require speculation.

Similarly, in *Myers v. Walker*, 322 S.W.2d 109 (Ky. 1959), the collision between two vehicles was allegedly caused by mud on a roadway deposited by various coal trucks. The *Myers* court reasoned:

From the evidence there is no doubt that quantities of mud were carried by the coal trucks of the Company and the Truckers from the mine and county road onto the highway where it fell from the wheels and was deposited on that part of the highway traveled by the Myers.

However, the evidence does not show that the deposits were made on the highway exclusively by the Company and the Truck Operators. There is nothing in the evidence to show that any particular truck carried mud upon the highway. Some may have carried mud and some not have carried mud. Mud could likewise have been carried by others living on and driving over the county road onto Highway No. 70. Others using the highway generally could well have contributed to the deposits on the highway. There is nothing to show that all of the mud or most of it was carried by coal trucks operating from the mine to the tipple but let us assume, however, that the evidence does so show. It is nevertheless the opinion of this Court that the Company, its partners, and each of the Truckers should have been granted a directed verdict as to all complaints against them.

*Id.* at 111-12. The *Myers* Court reasoned that speculation with regard to the identification of a party whose negligence allegedly caused the injury is improper.

*Id.* at 112.

In the instant case, there is no evidence other than Miller's unsupported assumptions as to who left water and/or other fluids on the roadway. It would require pure speculation to determine such an issue, which is improper.

Accordingly, the trial court properly granted summary judgment in favor of the appellees. Even if Miller were to be given every inference in his favor, which is required under standard summary judgment practice, Miller's claims would still fail. Kentucky law is clear that conclusory allegations based upon conjecture and

speculation is not sufficient to create an issue of fact to defeat summary judgment. *Henninger v. Brewster*, 357 S.W.3d 920 (Ky. App. 2012). The same is true with regard to Miller's claims against Whayne Supply and Consol.

Based on the foregoing, we affirm the summary judgment entered by the Letcher Circuit Court.

KRAMER, JUDGE, CONCURS.

NICKELL, JUDGE, CONCURS IN RESULT ONLY.

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